Supreme Court, U. S.
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80-279

No. ———

IN THE

Supreme Court of the United States

October Term, 1980

RIEGEL TEXTILE CORPORATION,
Petitioner,

vs.

LEE ANN GRYC, by her mother and natural guardian, JACQUELYN GRYC, and JACQUELYN GRYC, individually,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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Questions Presented

1. Whether a state court is pre-empted from assessing punitive damages against a fabric manufacturer when the fabric claimed to have been defectively manufactured admittedly complied with the safety standards contained within the applicable United States Statute, Flammable Fabrics Act of 1953, Ch. 164, §4, 67 Stat. 111, as amended, Ch. 833, 68 Stat. 770 (1954)?

2. Whether a state court is pre-empted from finding that fabric is defective and unreasonably dangerous where the fabric manufacturer admittedly complied with protective standards contained within the Flammable Fabrics Act of 1953, Ch. 164, §4, 67 Stat. 111, as amended, Ch. 833, 68 Stat. 770 (1954) and where under that statute the flammability of the fabric is classified as normal?

3. Whether a state court may refuse to apply a Federal statute because the state court finds the standard contained within the Federal statute is invalid?[1]

4. Whether an assessment, pursuant to a jury verdict, of $1,000,000.00 in punitive damages against a fabric manufacturer who has complied with all applicable Federal statutes and regulations is a denial of due process under the Fourteenth Amendment to the United States Constitution?

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[1]Petitioner considered an appeal under 28 U.S.C. §1257(1) based upon the Minnesota Supreme Court's express affirmance of the trial court's finding that the standard contained within the Flammable Fabrics Act of 1953 is invalid. While petitioner still believes an appeal may be appropriate, a Petition for Certiorari was made due to uncertainty as to whether the declaration of invalidity by the Minnesota Supreme Court was within the scope of 28 U.S.C. §1257(1).

5. Whether the trial court's jury instruction gave proper evidentiary weight to undisputed evidence that the manufacturer complied with the Flammable Fabrics Act of 1953, Ch. 164, §4, 67 Stat. 111, as amended, Ch. 833, 68 Stat. 770 (1954).[2]

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[2]The pertinent portion of the instruction was as follows:

"Now, repeated reference has been made in this case to a test called CS 191-53, which is a part of the Flammable Fabrics Act of 1953 as amended, and it is contended by the defendant Riegel Textile Corporation that the cotton flannelette manufactured by it was in compliance with that test; however, since the Flammable Fabrics Act is a criminal statute, compliance with that test is not the standard by which the conduct of the defendant Riegel Textile Corporation is to be measured.

As I told you before, the conduct of the defendant Riegel Textile is to be measured by whether the cotton flannelette was in a defective condition unreasonably dangerous to users, or consumers, at the time it left the factory. In reaching our conclusion on that point, you will consider, examine, and weigh with care all of the evidence in this case, including the CS 191-53 test, to determine whether the cotton flannelette failed to perform reasonably, adequately, and safely as pajamas, or sleepwear, in a setting in which it might be accidentally exposed to heat or flame." [Tr. 2051]

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vs.

LEE ANN GRYC, by her mother and natural guardian, JACQUELYN GRYC, and JACQUELYN GRYC, individually,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

Petitioner, Riegel Textile Corporation, prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Minnesota, filed on May 23, 1980.

Opinions Below

The Supreme Court of the State of Minnesota filed its opinion on May 23, 1980. It has not yet been reported. A copy is located in the Appendix at A-1. An Order denying a Petition for Rehearing, dated July 10, 1980 and which is also unreported, appears at A-40. The Opinion of May 23, 1980, affirmed a judgment entered in the

County of Ramsey in the Second Judicial District of the State of Minnesota entered pursuant to an Order and Memorandum of the trial court dated August 7, 1978. The Order and Memorandum appear at A-41.

Grounds Upon Which Jurisdiction Is Invoked

The Opinion of the Supreme Court for the State of Minnesota was filed on May 23, 1980. Rehearing was denied on July 10, 1980. This Petition is timely in that it is filed prior to the expiration of the 90-day period allowed by 28 U.S.C. §2101(c). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3) and Rule 17(1)(b) and (c) of the Rules of the Supreme Court of the United States.

Statutes and Constitutional Clauses Involved

The questions presented in this Petition for Certiorari involve the Flammable Fabrics Act of 1953, Ch. 164, 67 Stat. 111, as amended, Ch. 833, 68 Stat. 770 (1954). The standard of flammability is contained within Sec. 4 of the Act. The entire act has been reproduced in the Appendix at A-78. Sec. 4 incorporates by reference the commercial standard promulgated by the Secretary of Commerce effective January 30, 1953 and identified as "Flammability of Clothing Textiles, Commercial Standard 191-53". CS 191-53 as set out in 16 C.F.R. §1610, et seq., and has been reproduced at A-81.

The questions presented also involve the Fourteenth Amendment to the United States Constitution as well as the Commerce Clause and the Supremacy Clause of the United States Constitution. Art. 1, Sec. 8, Cl. 3 and Art.

VI, Cl. 2. These sections of the United States Constitution have been reproduced at A-102-3.

Statement of the Case

Plaintiff Jacquelyn Gryc initiated this product liability action in Ramsey County District Court in the Second Judicial District of the State of Minnesota to recover damages for burn injuries sustained by her minor daughter, Lee Ann. The incident occurred on December 8, 1969, when Lee Ann, then just short of five years of age, climbed up on a chair or counter and reached over three operating burners on an electric kitchen range for the purpose of turning off an overhead timer. Apparently while doing this, her flannelette pajamas ignited. The flannelette material was manufactured in August of 1967.

Plaintiff joined as defendants: appellant Riegel Textile Corporation, the manufacturer of the cotton flannelette cloth used in the pajamas; Style Undies, Inc., the designer and manufacturer of the pajamas; Associated Merchandising Corporation (AMC), the wholesaler of the pajamas; and Dayton-Hudson Corporation, the retailer. All of the defendants except for Riegel Textile Corporation settled with plaintiff prior to trial.

The matter was tried before the Court and a six-member jury in Ramsey County District Court. The jury found, by a 5/6 verdict,[3] that the cotton flannelette contained in the pajamas worn by Lee Ann Gryc and manufactured by petitioner Riegel was defective and that the defect was a cause of the injuries sustained by Lee Ann. The jury found that Riegel Textile Corporation was 90 percent

[3]Five of the six jurors joined in the verdict as provided for in Minn. Stat. 593.01.

responsible and Lee Ann Gryc was 10 percent responsible for her own injuries. The trial court subsequently held as a matter of law that Lee Ann could not be responsible for her own injuries. Compensatory damages were awarded in the amount of $750,000.00 and punitive damages were assessed against Riegel in the amount of $1,000,000.00. The judgment entered pursuant to the verdict was affirmed in all matters by the Minnesota Supreme Court in its opinion of May 23, 1980.

It was undisputed that the flannelette material contained in the subject pajamas complied with Commercial Standard 191-53, which is incorporated into and made a part of the Flammable Fabrics Act of 1953, Ch. 164, §4, 67 Stat. 111, as amended, Ch. 833, 68 Stat. 770 (1954). Under the Act, the flammability of the subject flannelette is classified as normal. Flammable Fabrics Act of 1953, Ch. 164, §4, 67 Stat. 111, as amended, Ch. 833, 68 Stat. 770 (1954); 16 C.F.R. §1610.3(a)(1)(ii).

The trial court ultimately ruled that compliance with the Flammable Fabrics Act and CS 191-53 did not provide a defense for Riegel since the CS 191-53 test was an "invalid" test. (Order and Memorandum, A-52 and 68.) The Minnesota Supreme Court affirmed the trial court's finding that the CS 191-53 test was invalid. (Opinion of May 23, 1978, A-14.) The Minnesota Supreme Court further held the state court was not pre-empted by the Flammable Fabrics Act and the Supremacy Clause of the United States Constitution from awarding compensatory damages and assessing $1,000,000.00 in punitive damages against a manufacturer whose product fully complied with the Flammable Fabrics Act.

How Federal Question Was Presented

Based in part upon the fact that there was full compliance with the Flammable Fabrics Act and the CS 191-53 test, motions for a directed verdict on both compensatory and punitive damages were made by Riegel.[4]

Petitioner requested two jury instructions concerning the weight to be given the undisputed compliance by the manufacturer with the Flammable Fabrics Act.[5] Both instructions were denied by the trial court.

The trial court's instruction concerning the Flammable Fabrics Act and specifically the CS 191-53 standard was raised in Riegel's post trial motions. The issue was also extensively briefed at this point.[6] The trial court discussed this issue in its Order and Memorandum denying the post trial motions. A-49. The issue was again raised in both Petitioner's Appellate Brief and its Petition for Rehearing. The Minnesota Supreme Court was silent on this issue.

The issue of whether the Flammable Fabrics Act preempts the enforcement of any inconsistent state law or court ruling was initially raised by Riegel's Motion for a Directed Verdict based, in part, upon its undisputed compliance with the CS 191-53 standard of the Flammable Fabrics Act.[7] The issue was again raised and extensively briefed during the post trial motions[8] and in Petitioner's

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[4]This appears at Pages 1705 and 1708-9 of the trial transcript which has been reproduced at A-75.

[5]The requested jury instructions have been reproduced at A-75.

[6]Excerpts of the post trial motion and briefs in support of the post trial motion have been reproduced at A-104.

[7]See Pages 1705 and 1708-9 of the trial transcript reproduced at A-75.

[8]Excerpts from Riegel's Post Trial Motion and supporting briefs have been reproduced at A-104.

Appellate Brief. The Minnesota Supreme Court devoted a significant portion of its opinion to this issue.

The due process issue was first raised as a *separate* issue in the Petition for Rehearing. It was raised in response to the Minnesota Supreme Court's holding that the Flammable Fabrics Act does not pre-empt the state court's imposition of punitive damages. The Court did not address the issue in its Order denying the Petition for Rehearing.

Reasons for Granting the Writ

1. *To decide an important Federal constitutional issue.*

An analysis of the pre-emption issue in a case such as this requires at the outset a determination as to whether Congress intended to pre-empt the area, in this case, the regulation of flammable fabrics. The intent of Congress is revealed by the statutory scheme and its legislative history. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); and *Northern States Power Co. v. State of Minn.*, 447 F.2d 1143 (8th Cir. 1971) affirmed, 405 U.S. 1035. A review of the statute and the legislative history of the Flammable Fabrics Act of 1953, Ch. 164, 67 Stat. 111, as amended, Ch. 833, 68 Stat. 770 (1954) clearly indicates an intent by Congress to obtain a uniform standard and to pre-empt state action.[9]

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[9]Senate report No. 400 demonstrates this intent. It states in part:

> "Moreover, the committee was urgently requested to take prompt action on this legislation. It was pointed out that if this legislation is not enacted, a variety of State and local regulations lacking in *uniformity* might very well ensue. It seems obvious that *uniformity of regulation* in this matter is necessary." (emphasis added) 1953 U.S. Code and Administrative News, 1722, 1724.

Given the clear intent of Congress to pre-empt state action in order to obtain a uniform set of regulations for fabric manufacturers, there should be no argument that

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The danger of State regulation in this area is more clearly stated in the testimony of Charles W. Dorn, Chairman of the Technical Committee of the National Retail Dry Goods Association, who appeared before the Committee in support of the legislation. Mr. Dorn's testimony quoted in the Committee report was termed "another cogent reason for its [Flammable Fabrics Act] enactment". He testified in part:

> "* * * The confusion which is bound to result if the several states were to legislate individually on the subject is obvious, for in the absence of a national standard, each state and local community would provide for different guides or measurements. I can readily testify that this is not an idle conclusion, for in the past months the possibility of a Federal enactment has been the sole basis for postponing very unsatisfactory legislation in several States.
>
> "Failure by this Congress to act undoubtedly will cause a flood of haphazard local legislation which will not only bring on an impossible situation in the textile industries, but, more important, will deny to many consumers the responsible protection contained in the proposed bills.
>
> "The manufacturers of your respective States would have great difficulty in producing garments or fabrics which would comply with the different requirements of two or twenty different state acts, to say nothing of different local ordinances * * * 1953 U.S. Code and Administrative News at 1727.

The Flammable Fabrics Act amended in 1967 to add an explicit pre-emption provision:

> "This Act is intended to supersede any law of any State or political subdivision thereof inconsistent with its provisions." Flammable Fabrics Act, Pub.L. No. 90-189, §16, 81 Stat. 568.

An explanation of this pre-emption provision was contained within the Committee report on the Flammable Fabrics Act, 103 Congressional Record 20328 (July 27, 1967):

> "EFFECT ON STATE LAW
>
> "The mass production, high volume, and national marketing character of the textile industry requires that flammability standards be uniform throughout the country. Accordingly, the bill would preempt any law of any state or political subdivision thereof which is inconsistent with its provision.
>
> "This bill would not affect the state's ability to set more stringent requirements *for their own procurement* and for state and local fire building codes. *However, it would avoid multiple regulation of manufacturers covered by the federal law.*" (Emphasis added.)

Minnesota would be precluded from enforcing legislation imposing a $1,000,000.00 fine on textile manufacturers whose products, while fully complying with the standards set out in the Flammable Fabrics Act, did not comply with Minnesota's own safety standards. *Ray v. Atlantic Richfield Co.*, supra, and *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

The affront to Congress' stated intent of uniformity is even greater in the case of an ad hoc decision of five randomly selected jurors than in the case of fifty different state regulatory schemes throughout the nation. In the case of the state regulatory schemes, the schemes are enacted by the legislature or promulgated by a regulatory agency after notice and hearings complying with certain due process requirements. Obviously, that is not the case with an ad hoc decision of five jurors. Even more importantly, in the case of the fifty state regulatory schemes, the fabric manufacturers would be aware of the regulations and able to take actions to conform with the regulations. In stark contrast, the fabrics manufacturers have little indication as to the criteria to be used by randomly selected jurors who are given extremely vague criteria in their instructions.

Upholding such punitive damage awards would have an undue burden on interstate commerce and would have a chilling effect on product manufacturers. In order to safeguard itself from the imposition of punitive damages, the manufacturer would be compelled to refrain from manufacturing and marketing many useful and relatively inexpensive products. Instead, the manufacturer would be compelled to manufacture products, which while being

marginally safer, would likely be inferior in quality, less useful and more expensive. Such a result may be a legitimate policy decision, but such policy decisions are exclusively within the province of Congress to make. Such a decision was made at the time of the enactment of the Flammable Fabrics Act of 1953. A jury of five should not be able to replace the judgment of Congress with its own.

The assessment of a $1,000,000.00 penalty against petitioner cannot be justified by calling the punitive damage assessment a private remedy which is not provided for in the Act. The purpose of punitive damages are not to compensate the plaintiff for her injuries. Rather, punitive damages are intended to punish the actor for his malicious acts and deter others from performing similar acts. *Benson Coop. Creamery Assn. v. First Dist. Assn.*, 276 Minn. 520, 151 N.W.2d 422 (1967); *Kirschbaum v. Lowrey*, 165 Minn. 233, 206 N.W. 171 (1925).

Obviously, the injunctive relief and sanctions available under the Flammable Fabrics Act are provided for the same purpose. The doctrine of pre-emption precludes a manufacturer from being punished by sanctions much more severe than those available under the United States statute when the actions being punished are in conformity with applicable safety regulations contained within the United States statute. *Ray v. Atlantic Richfield Co.*, supra, and *Jones v. Rath Packing Co.*, supra.

2. *The issue of whether a state is pre-empted from punishing a manufacturer of a fabric which substantially exceeds applicable safety standards contained in a United States statute has never been considered by a United States Appellate Court.*

Petitioner has been unable to locate any appellate decision, save for the subject decision by the Minnesota Supreme Court, which has considered the issue of whether punitive damages can be assessed when the subject fabric undisputedly complies with the CS 191-53 standard contained in the Flammable Fabrics Act of 1953. In fact, petitioner has been unable to locate any appellate decision allowing punitive damages when a manufacturer has complied with all Federal regulations.[10]

> This is an issue of great importance which will arise again and again in the immediate future as increasingly more jurisdictions allow punitive damages in products liability actions. Guidance from the United States Supreme Court is imperative to settle the issue as to whether compliance with an applicable federal safety standard precludes the imposition of punitive damages against the complying manufacturer.

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[10]Reference should be made, however, to *Ralph Nader Connecticut Citizen Action Group v. Allegheny Airlines, Inc.* (U.S.C.A. D.C., filed May 16, 1980), reproduced at A-89. There, the Court held it was err to assess punitive damages against an airlines for overbooking when the airlines' action "conformed to the standards set and the practices approved by the agency charged with the duty of regulating it—standards and practices that the agency has found to be in the public interest." (A-97). The same can be said for the standards regulating fabric manufacturers contained in the Flammable Fabrics Act which was found by Congress to be in the public interest.

3. *Both the jury instruction concerning the evidentiary weight to be given Riegel's undisputed compliance with the CS 191-53 test of the Flammable Fabrics Act and the trial court's holding that the CS 191-53 was invalid, conflict with circuit court decisions construing and applying the Flammable Fabrics Act.*

Riegel requested the trial court instruct the jury as follows:

> "You are instructed that evidence that the fabric sold by defendant Riegel Textile passed the Federal Flammable Fabrics Act test, CS 191-53, is evidence that the fabric was not unreasonably dangerous at the time of its sale."

The request was denied.

The trial court determined that the CS 191-53 test contained in Section 4 of the Flammable Fabrics Act was invalid. (Order and Memorandum at A-52 and 68). Based upon this finding, the trial court refused to give an instruction giving evidentiary weight to Riegel's compliance with the Act. In fact, Riegel's compliance with the Act was termed by the trial court to be "hid[ing] behind the invalid CS 191-53 Flammability test" and a basis for an award of punitive damages (Order and Memorandum A-64). The Minnesota Supreme Court affirmed the finding that CS 191-53 was invalid. (Opinion of May 23, 1980, A-14.)

Circuit court decisions which have considered the issue have held to the contrary. *Simien v. S. S. Kresge Co.*, 566 F.2d 551 (5th Cir. 1978); *Bellotte v. Zayre Corp.*, 531 F.2d 1100 (1st Cir. 1976); *Raymond v. Riegel Textile Corp.*, 484 F.2d 1025 (1st Cir. 1973); and *Howard v.*

McCrory Corp., 601 F.2d 133 (4th Cir. 1979). While the cases hold that compliance with the Flammable Fabrics Act and the CS 191-53 standard is not in itself conclusive evidence that the fabric is not unreasonably hazardous, compliance with the Act and the standard have been consistently held to be relevant evidence that the subject fabric was not unreasonably hazardous. In fact, in *Simien v. S. S. Kresge Co.*, supra, the Court held that an instruction that compliance with the Commercial Standard was evidence that the subject jacket was defective was in and of itself grounds for reversal. *Id.* 566 F.2d 554-5. The Court further held that the erroneous instruction, when considered in light of the charge as a whole, could at best be considered internally inconsistent. Since this inconsistency may well have deprived Kresge of the benefit of its persuasive evidence on the issue of liability, a reversal was granted. *Id.* 566 F.2d at 555. Exactly the same can be said of the trial court's instruction in this case.

The Minnesota State Court's failure to give proper evidentiary weight to compliance with the Federal Act and Standard is an insult to the Federal system and a clear violation of both the Commerce Clause and the Supremacy Clause of the United States Constitution. (Art. I, Sec. 8, Cl. 3 and Art. VI, Cl. 2.)

CONCLUSION

Petitioners respectfully request the Court to issue a writ of certiorari to the Supreme Court of Minnesota.

Respectfully submitted,

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APPENDIX

No. 4 Ramsey County Todd, J.

Lee Ann Gryc, by her mother and natural guardian, Jacquelyn Gryc, and Jacquelyn Gryc, individually,

Respondents,

vs.

Dayton-Hudson Corp., et al,

Defendants,

Riegel Textile Corp.,

Appellant.

Endorsed
Filed May 23, 1980
John McCarthy, Clerk
Minnesota Supreme Court

49334 and 49525

SYLLABUS

1. Punitive damages may properly be awarded in an appropriate strict liability case.

2. Appellant's compliance with an applicable federal safety standard does not preclude a punitive damages award as a matter of law.

3. The preemption provision of the federal Flammable Fabrics Act and the Supremacy Clause of the United States Constitution do not prohibit the imposition of punitive damages on a defendant who has complied with that Act.

4. Since appellant failed to object below to the trial court's instruction to the jury on the issue of punitive damages, the instruction became the law of the case and is not subject to review on appeal.

5. There was sufficient evidence to support the award of punitive damages.

6. Policy considerations do not dictate against an award of punitive damages in this case.

7. The award of $1,000,000 in punitive damages is not clearly excessive as a matter of law.

8. There was sufficient evidence to support the finding that appellant manufactured a defective product and that respondents were not aware of the defect.

9. The jury verdict was not perverse when it found appellant to have caused respondents' injuries while at the same time finding that the other defendants in the stream of commerce did not cause those injuries.

10. Appel'ant was not prejudiced by the trial court's dismissal of appellant's counterclaim against Jacquelyn Gryc when the jury found that Jacquelyn Gryc was not at fault.

11. The trial court did not err in finding that the 4-year-old child, Lee Ann Gryc, could not be comparatively at fault as a matter of law.

12. There is no merit to appel'ant's contention that the trial court committed cumulative errors and that respondents' counsel engaged in misconduct which denied appellant a fair trial.

13. The award of $750,000 in compensatory damages is not clearly excessive as a matter of law.

Affirmed.

Heard, considered, and decided by the court en banc.

OPINION

TODD, Justice.

On December 8, 1969, Lee Ann Gryc, then 4 years of age, was clothed in pajamas made from a cotton material manufactured by defendant Riegel Textile Corporation (Riegel). The material was commercially known as "flannelette." It was not treated but did meet the minimum federal standards of product flammability. Lee Ann reached across the electric stove in her home to shut off a timer. Her pajamas were instantly ignited and she received severe burns over her upper body. The jury found Riegel liable for these injuries and awarded Lee Ann $750,000 in compensatory damages and $1,000,000 in punitive damages. We affirm.

At the time of the incident, the Gryc family consisted of Gerry Gryc, his wife Jacquelyn, and their two children, Tammy, age 6, and Lee Ann, age 4. On the morning of December 8, 1969, Jacquelyn Gryc, after sending Tammy to school, began doing housework around her home. She was cooking various items on three burners of an electric stove. Just prior to the accident, she set a timer situated above the stove and went down into the basement to do some laundry. At that time, Lee Ann was watching television in the living room. She was clothed in pajamas, the fabric of which was 100 percent untreated cotton flannel-

ette manufactured by Riegel. Gerry Gryc had just risen and was getting dressed in an upstairs bedroom.

It appears that, at approximately 9:30, the timer on the stove went off, Lee Ann went into the kitchen, pulled a chair over to the stove, climbed onto it, reached above the stove, and turned off the timer. Her pajama top came in contact with a lighted burner and ignited. Her parents heard Lee Ann scream. Jacquelyn, who had been proceeding up the back stairway to turn off the timer, ran up the stairs and saw Lee Ann standing near the top of the stairs. Lee Ann's pajama top was engulfed in flames. Jacquelyn grabbed a towel, wrapped it around Lee Ann, and extinguished the flames. It was estimated that the pajama top burned for 8 to 12 seconds before it was extinguished. Gerry Gryc ran downstairs and immediately drove Lee Ann to a nearby hospital.

Lee Ann remained in the hospital through January 1970. As a result of the incident, she suffered severe second- and third-degree burns and resultant scars on 20 percent of her body in the regions of her arms, chest, breasts, stomach, back, neck, and chin. During her hospitalization, Lee Ann underwent skin grafting procedures. Lee Ann has additional scars on her thighs as a result of these procedures. Lee Ann's scars are permanent—her appearance cannot be improved through plastic surgery.

At trial, plaintiffs contended and presented evidence which tended to prove that the fabric used in the Gryc pajamas was defective. They claimed and their evidence tended to show that: (1) the cotton flannelette was unreasonably dangerous for use in children's sleepwear because of its highly flammable characteristics; (2) there were

commercially available durable flame retardant chemicals which could have significantly increased the safety of the product; (3) there were inherently flame retardant synthetics which could have been used for children's sleepwear instead of cotton flannelette; (4) garment manufactures, sellers, and consumers should have been warned of the flammable characteristics of the cotton flannelette; and (5) consumers should have been instructed of a simple home remedy which could have been used to flame retard the fabric after each washing.

Riegel defended the action by attempting to prove that the cotton flannelette was not unreasonably dangerous because: (1) it complied with the federal Flammable Fabrics Act; (2) no warning was necessary since cotton flannelette contained only normal and obvious hazards; and (3) the state of the art during the relevant time period was such that there were no chemical durable flame retardant chemicals available for use on cotton flannelette which would not negatively affect the fabric and make it unsaleable, and there were no available inherently retardant synthetics for use in children's sleepwear.

The pajamas worn by Lee Ann were two-piece, loose-fitting, and the pajama top flared out at the waist. The flannelette used in the pajamas was manufactured by Riegel and distributed to defendant Style Undies, Inc., on or before August 31, 1967. An employee of defendant Associated Merchandising Corporation (AMC) contacted Style Undies, Inc., about producing cotton flannelette sleepwear for children. The employee of AMC selected the fabric and design of the pajamas. After Style Undies, Inc., manufactured the pajamas, AMC distributed them to its member store, defendant Dayton-Hudson Corpora-

tion. Jacquelyn Gryc bought the pajamas at a Dayton-Hudson store in the summer or fall of 1969.

The flannelette used in Lee Ann's pajamas was woven material made from yarns spun from natural cotton fiber. The fabric was brushed on one side which created a nap. Flannelette is light weight, warm, and absorbent. It has a soft feel or "hand", breathes well, and is launderable and durable. It is relatively inexpensive. Flannelette was very popular during the relevant time period because of these qualities and was the dominant fabric used in children's winter sleepwear.

The flannelette used in Lee Ann's pajamas was not treated with any flame retardant. Its flammable characteristics were demonstrated by one of plaintiffs' expert witnesses, Dr. Robert Johnson, by film at trial. Dr. Johnson reconstructed Lee Ann's accident by making a copy of Lee Ann's pajamas, placing them on a mannequin the size of Lee Ann, and using an ignition source similar to the Gryc electric burner. The film showed that the fabric ignited instantaneously when the hem of the pajama top was placed in contact with the ignition source. The front of the pajama top burned from hem to neck in 4 to 5 seconds. The same experiment was performed on a pair of pajamas of the same design but constructed of newsprint. The newsprint pajamas burned only slightly faster than did the untreated flannelette pajamas.

Plaintiff's experts concluded that the untreated cotton flannelette was unreasonably dangerous for use in children's sleepwear because of the instantaneous manner in which the fabric ignited, the speed at which it burned, the amount of heat produced when it burned, and the difficulty of extinguishing the flames. Defendant's experts

characterized these burning characteristics as "normal" for the mass of the fabric and as a "natural" phenomenon for cotton, the characteristics of which had not changed for hundreds of years. They concluded, therefore, that the fabric used in the Gryc pajamas was not defective.

The bulk of the testimony at trial concerned the state of the art with respect to flame-retardant processes at the time the fabric used in the Gryc pajamas was manufactured. It was not seriously disputed at trial that there were products available from the early 1950's through 1967 which were capable of being applied to lightweight cotton flannelette which would flame retard the fabric and which were durable, i. e., would remain on the fabric through 50 washings. These products were manufactured by various companies and were identified at trial by various trade names —Proban, Pyrovatix, Roxel, and Lynrus FR-1. All of these products were made from the chemical tetrakis hydromethyl phosphonium chlorida (THPC).

It was shown at trial that the safety of cotton flannelette could be significantly increased by applying this type of product to the fabric. Dr. Johnson, by film, demonstrated the flammable characteristics of flame retarded cotton flannelette. He created a pair of pajamas like those which Lee Ann had worn, except that they were treated with a flame-retardant process available in 1967. The pajamas were placed against a heat source similar to an electric burner for 30 seconds. The pajamas blackened, burned, and charred but did not flame in an area 6 inches wide and 8 inches long in that 30 seconds. When the fabric was removed from the heat source, the blackening and charring stopped.

The serious dispute between the experts concerned the availability of flame-retardant processes during the relevant time period which would not destroy the desirable characteristics of cotton flannelette. Plaintiffs' experts testified that, as early as 1962, there were flame-retardant processes which would be applied to the fabric without adversely affecting its qualities enough to make it unsaleable. Plaintiffs also showed that, in England, flannelette-like sleepwear was required by law to be flame retarded since the 1950's.

Defendant's experts were of the opposite view. They testified that there were no durable flame retardant chemicals which could be applied to the fabric without severely reducing its tensile and tear strength, its soft feel, increasing its weight and cost, and adversely affecting the color of the fabric.

Plaintiffs' witnesses admitted that there were no mills producing flame retarded flannelette for public consumption in any volume in 1967. However, both of plaintiffs' experts testified that the flame retardant chemicals and the process for applying them could have been made commercially available as early as 1962-1966, if only the textile mills had so desired.

There was limited testimony concerning the availability of inherently flame retardant synthetics for use in children's sleepwear in 1967. Plaintiffs' expert testified that such products could have been made at that time. Defendant's experts testified that these products could not be spun finely enough to make flannelette-type yarn, were not soft, would shrink, and were unreasonably costly.

Defendant's experts contended that no warning of the flammable characteristics of cotton flannelette was nec-

essary on the Gryc pajamas because its burning characteristics are obvious and natural for the mass of the fabric. However, p'aintiffs introduced a great amount of testimony tending to show that garment manufacturers, wholesalers, retailers, and consumers were not aware of the highly flammable characteristics of untreated cotton flannelette. Their evidence tended to show that Riegel and other garment manufacturers were uniquely aware of these characteristics.

Defendant's experts were also of the opinion that a warning would not be feasible or practical because Riegel could not be assured that such a warning wou'd get beyond the garment manufacturers. However, there was testimony that for other purposes Riegel could and did use tags which were sent through the chain of commerce and did reach consumers.

Defendant's experts were also of the opinion that a warning would "stigmatize" Riegel's flannelette and make it unmarketable as compared with identical flannelette from competitor mills.

Plaintiffs also claimed that defendant Riegel should have instructed consumers of a home remedy which would temporarily flame retard flannelette pajamas. This remedy, a water base so'ution of boric acid and borax, would come out in the wash, but could be simply sprinkled on clothing after each washing. Dr. Johnson conducted a test with a pair of flannelette pajamas treated with such a solution. The pajamas did not ignite when they were held against a hot plate for 5 seconds.

The issues presented on this appeal are:

(1) Whether the award of punitive damages is an appropriate remedy in a products liability case;

(2) Whether defendant's compliance with an applicable federal safety standard precludes a punitive damages award;

(3) Whether the imposition of punitive damages on a defendant who has complied with the federal Flammable Fabrics Act is prohibited by the preemption provision of that Act or by the Supremacy Clause of the United States Constitution;

(4) Whether the trial court applied the proper legal standard in instructing the jury on the issue of punitive damages;

(5) Whether there was sufficient evidence to support the award of punitive damages in this case;

(6) Whether policy considerations dictate against an award of punitive damages in this case;

(7) Whether the award of $1,000,000 in punitive damages is excessive;

(8) Whether there was sufficient evidence to support a finding that defendant manufactured a defective product and that plaintiffs were not aware of the defect;

(9) Whether the jury verdict was perverse when it found defendant Riegel to have caused plaintiffs' injuries while at the same time finding that the other defendants in the stream of commerce did not cause those injuries;

(10) Whether defendant was prejudiced by the trial court's dismissal of defendant's counterclaim against Jacquelyn Gryc when the jury found that Jacquelyn Gryc was not at fault;

(11) Whether the trial court erred in finding that the 4-year-old child, Lee Ann Gryc, could not be comparatively at fault as a matter of law;

(12) Whether the trial court committed cumulative errors and plaintiffs' counsel engaged in misconduct which denied defendant a fair trial;

(13) Whether the award of $750,000 in compensatory damages is excessive.

1. This case presents the question, not heretofore considered by this court, of whether punitive damages may be appropriately awarded in the context of a strict liability action. There is ample authority from many jurisdictions approving this remedy in strict liability cases.[1] An exhaustive article, Owen, *Punitive Damages in Products Liability Litigation,* 74 Mich. L. Rev. 1258 (1976), discusses the pros and cons of allowing such an award. The author concludes that punitive damages are an appropriate remedy in such cases based on the following rationale:

> Manufacturers have a powerful hold over the means for discovering and correcting product hazards. Through the processes of design, testing, inspection

[1]*See Hoffman v. Sterling Drug, Inc.*, 485 F. 2d 132 (3rd Cir. 1973); *Gillham v. Admiral Corp.*, 523 F. 2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976); *Boehm v. Fox*, 473 F. 2d 445 (10th Cir. 1973); *Maxey v. Freightliner Corp.*, 450 F. Supp. 955 (N. D. Tex. 1978); *Drake v. Wham-O Mfg. Co.*, 373 F. Supp. 608 (E. D. Wis. 1974); *Sturm, Ruger & Co. v. Day*, 594 P. 2d 38 (Alaska 1979); *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967); *Moore v. Jewel Tea Co.*, 116 Ill. App. 2d 109, 253 N. E. 2d 636 (1969), *aff'd*, 46 Ill. 2d 288, 263 N. E. 2d 103 (1970); *Rinker v. Ford Motor Co.*, 567 S. W. 2d 655 (Mo. Ct. App. 1978). *But see Roginsky v. Richardson-Merrell, Inc.*, 378 F. 2d 832 (2nd Cir. 1967).

> and collection of data on product safety performance in the field, the manufacturer has virtually exclusive access to much of the information necessary for effective control of dangers facing product consumers. * * *
>
> Most manufacturers, both from a desire to avoid liability and from a generalized sense of social responsibility, prudently use their resources to prevent excessively hazardous products from reaching or staying on the market. On occasion, however, manufacturers abuse their control over safety information and market defective products in flagrant disregard of the public safety. * * * A legal tool is needed that will help to expose this type of gross misconduct, punish those manufacturers guilty of such flagrant misbehavior, and deter all manufacturers from acting with similar disregard for the public welfare. The punitive damages remedy is such a tool.

Id. at 1258-60.

Based on this rationale, we recognize today that punitive damages, in an appropriate case, may properly be awarded in a strict liability action.

2. The Flammable Fabrics Act of 1953, Chap. 164, § 4, 67 Stat. 111, as amended, Chap. 833, 68 Stat. 770 (1954), in effect at the time this cause of action arose,[2] applied to fabrics sold in interstate commerce for wearing apparel. This statute sets forth a test to determine whether a fabric is dangerous when used in clothing. This test,

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[2]The Flammable Fabrics Act was subsequently amended to provide for more stringent regulation of fabric used for children's sleepwear. However, these revisions are inapplicable to this cause of action.

termed CS 191-53, requires that sample fabrics be dried out and cut into 2-inch by 6-inch lengths. The samples are mounted in an enclosed testing box at a 45° angle. The sample is then impinged with a standard 5/8 inch flame at the top of the fabric for 1 second. If the fabric ignites, the number of seconds it takes the flame to burn 5 inches is measured. A napped fabric which does not ignite in 1 second or which ignites and burns 5 inches in more than 4 seconds is considered to be of intermediate flammability, passes the test, and may be used in wearing apparel. *See* 16 C.F.R. §§ 1610.3(2), 1610.4 (1977).

The fabric in the Gryc pajamas passed the CS 191-53 test. The fabric did not ignite in 1 second and when a forced ignition test was used, the fabric ignited in an average time of 1.8 seconds and the average burning time was 9.8 seconds. Therefore, under the Flammable Fabrics Act, the Riegel flannelette was properly saleable in interstate commerce.

Riegel argues that its compliance with the federal Act precludes, as a matter of law, a finding of that guilty state of mind which is a necessary prerequisite to a punitive damages award. It argues that it was justified in relying on the Act in determining which fabrics were safe for dissemination in the marketplace. The trial court addressed this issue in its post-trial memorandum and found:

> The difficulty with [Riegel's] argument is that it does not assess the validity of the test. It was proven almost conclusively at trial that this test did not and could not properly determine the flammability of fabrics such as cotton flannelette. Moreover, it was almost conclusively established, in addition, that de-

> fendant Riegel knew not only that the test was invalid but that it could not evaluate the flammability of its products * * *. Knowing full well at all times after the passage of the Flammable Fabrics Act that CS 191-53 was unreliable, the defendant cannot today say that punitive damages should not be allowed simply because its cotton flannellette passed an unreliable test. Riegel's argument that it had a right to act on the basis of the legislation * * * is a specious one, because such actions were not taken in good faith and must be viewed in the context of the knowledge that Riegel had that its cotton flannelette was extremely dangerous to the public because of its racing flammability.

On reviewing the record, we have determined that the trial court's findings are supported by the evidence and that its conclusions are correct. There was substantial evidence at trial which established that the CS 191-53 test was not a valid indicator of the flammable characteristics of fabrics and did not take into account the uses to which a fabric would be put in determining its safety.[3] It was shown that newspaper passed the CS 191-53 test with a 48-percent margin of safety.

It was also shown that the original intent of Congress in passing the CS 191-53 test into law was primarily to

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[3]The commentators have agreed. *See* Swartz, *Product Liability: The Torch Cases*, 76 Case & Comment, No. 1, p. 3 (1971); Comment, *Dressed to Kill: The Flammable Fabrics Act of 1953*, 4 Cum.-Sam. L. Rev. 358 (1973); Note, *The Human Torch—An Exegesis About the Clothes We Wear*, 23 S. S.C. L. Rev. 787 (1971); Note, *Flammable Fabrics Act Protection: Fire Resistants v. Industry Resistance*, 39 Geo. Wash. L. Rev. 608 (1971); Campbell & Vargo, *The Flammable Fabrics Act and Strict Liability in Tort*, 9 Ind. L. Rev. 395 (1976).

protect the public against certain highly flammable synthetic products, not all unreasonably dangerous clothing. 1953 U.S. Code Cong. & Ad. News 1723.[4]

Furthermore, there was evidence that the test was adopted as a result of industry influence and, therefore, served to protect the textile industry rather than the public. It was the textile industry which originally formulated the test, and in 1960 one of Riegel's vice presidents stated:

> The AATCC [American Association of Textile Chemists and Colorists] not only developed an adequate testing mechanism, *but was instrumental in guiding the government toward drawing up regulations and specifications.* [Emphasis added.]

The evidence established that Riegel knew of the invalidity of the CS 191-53 test and was aware that unreasonably dangerous fabrics passed the test. Rigel's head of research, Linton C. Reynolds, knew that newspaper

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[4]In 1967, the Consumer Subcommittee of the Senate Committee on Commerce, in discussing the need for amendments to the federal Flammability Act, noted:

> Congress enacted the Flammable Fabrics Act (which became effective on July 1, 1954) to protect the public from newly introduced highly flammable clothing, including "torch sweaters" and certain children's cowboy chaps. Congress set the level of protection by incorporating fixed standards of flammability into the Act. These fixed standards were stringent enough to halt the marketing of the highly flammable articles of clothing noted above, but did not affect the marketing of most materials and articles of clothing that were then—and are still now—commonly in use.
>
> Therefore, while the Act has been successful in preventing the marketing of newer highly flammable materials, theerby preventing a likely increase in clothing fire injury and death rates, it has not reduced those rates—they remain unabated.

To Amend the Flammable Fabrics Act: Hearings on S.1003 before Consumer Subcomm. of the Senate Comm. on Commerce, 90th Cong., 1st Sess. 7 (1967).

and 19 other samples of paper passed the CS 191-53 test and communicated this to a Riegel top official. In addition, Riegel knew that persons were suffering severe burn injuries when Riegel's flannelette ignited. In 1956, one of Riegel's top officials wrote in a memorandum, "We are always sitting on somewhat of a powder keg as regards our flannelette being so infiammable." The memorandum was entitled "Flammability—Liability."

Several courts have addressed the issue of whether compliance with the CS 191-53 test precludes liability for compensatory damages as a matter of law and have concluded that it does not. *See Raymond v. Riegel Textile Corporation,* 484 F. 2d 1025 (1st Cir. 1973); *LaGorga v. Kroger Co.,* 275 F. Supp. 373 (W. D. Pa. 1967), *aff'd,* 407 F. 2d 671 (3rd Cir. 1969); *Howard v. McCrory Corp.,* 601 F. 2d 133 (4th Cir. 1979); *Sherman v. M. Lowenstein & Sons, Inc.,* 28 App. Div. 2d 922, 282 N.Y.S. 2d 142 (1967). These courts reasoned that since it was shown that the test was invalid, compliance with that test did not preclude a finding that a product was unreasonably dangerous. For the same reason, we conclude that while compliance with this test may be relevant to the issue of punitive damages, it does not preclude such an award as a matter of law.

3. In 1967, the Flammable Fabrics Act was amended to include the following preemption provision:

> This Act is intended to supersede any law of any State or political subdivision thereof inconsistent with its provisions.

Flammable Fabrics Act, Pub. L. No. 90-189, § 16, 81 Stat. 568. Riegel contends that the imposition of punitive damages on the defendant who has complied with the Flammable Fabrics Act constitutes an inconsistent state law which is preempted by the Act. Riegel argues, therefore, that the punitive damages award in this case is violative of the Act and the Supremacy Clause of the United States Constitution.

In the case of *Northern States Power Co. v. Minnesota*, 447 F. 2d 1143, 1146-47 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972), the Eighth Circuit succinct'y stated the general framework of analysis to be applied in determining whether a particular state law is preempted by federal legislation:

> Once it is ascertained that the federal government possesses the power to regulate in a given area, the question is whether Congress has exercised its power of legislation in such a manner as to exclude the states from asserting concurrent jurisdiction over the same subject matter.
>
> First, as the Supreme Court noted in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S. Ct. 1210, 1217, 10 L. Ed. 2d 248 (1963), "[a] holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility * * *. [Citations omitted.]
>
> Second, absent inevitable collision between the two schemes of regulation it must be determined whether Congress manifested an intent to displace coincident

state regulation in a given area. Where Congress has unequivocally and expressly declared that the authority conferred by it shall be exclusive, then there is no doubt but that states cannot exert concomitant or supplementary regulatory authority over the identical activity. [Citations omitted.]

Third, even where Congress has not expressly prohibited dual regulation nor unequivocally declared its exclusionary exercise of authority over a particular subject matter, federal preemption may be implied. [Citations omitted.] Key factors in the determination of whether Congress has, by implication, preempted a particular area so as to preclude state attempts at dual regulation include, *inter alia:* (1) the aim and intent of Congress as revealed by the statute itself and its legislative history [Citations omitted]; (2) the pervasiveness of the federal regulatory scheme as authorized and directed by the legislation and as carried into effect by the federal administrative agency, [Citations omitted]; (3) the nature of the subject matter regulated and whether it is one which demands "exclusive federal regulation in order to achieve uniformity vital to national interests." [Citations omitted]; and ultimately (4) "whether, under the circumstances of (a) particular case (state) law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [Citations omitted.]

It is evident that Congress properly promulgated the Flammable Fabrics Act pursuant to the Commerce Clause

power granted to it by the United States Constitution. Therefore, we must first determine whether Congress expressly intended, by the Act's preemption provision, to preclude the state private remedy of punitive damages.

The stated purpose of this preemption provision was to preclude the multiple regulation of textile manufacturers by providing a "uniform" federal regulation. Report of the Senate Commerce Committee, 113 Cong. Rec. 20328 (1967). Riegel argues that the punitive damages remedy serves to frustrate this stated purpose by imposing a higher duty on a textile manufacturer than is required by the federal Act. The punitive damages remedy serves to punish a textile manufacturer for and deter that manufacturer from willfully, wantonly, or maliciously marketing a fabric which is unreasonably dangerous under state law. As such, it does place a higher duty on a manufacturer by requiring it to forbear from se'ling such a fabric even though that fabric is in compliance with the Flammable Fabrics Act. However, we have determined upon reviewing the federal statute and its legislative history that the punitive damages remedy is not the type of inconsistent state law which Congress expressly intended to preempt.

It is clear that the imposition of punitive damages on a manufacturer who has complied with the Act is not inconsistent with that Act in the sense that it would be impossible for a textile manufacturer to comply with the state-established duty and at the same time comp'y with the federal Act. The punitive damages remedy merely serves to impose a higher duty on that manufacturer.

It appears that the preemption provision of the Act, as originally drawn, was given varying interpretations. Some viewed the Act as merely establishing minimum safety

standards while others viewed it as establishing a mandatory national requirement. 1976 U.S. Code Cong. & Ad. News 1003-4. In response to this confusion, Congress enacted an amendment to the 1967 preemption provision which was intended to clarify it and was designed to meet the competing interests of those who viewed the Act as setting mere minimum requirements and those who opted for a uniform requirement. *Id.* The 1976 amendment to the preemption provision, Flammable Fabrics Act, 15 U.S.C.A. § 1203 (West, 1979), provides in part:

> (a) Except as provided in subsections (b) and (c) of this section, whenever a flammability standard or other regulation for a fabric * * * is in effect under this chapter, no State or political subdivision of a State may establish or continue in effect a flammability standard or other regulation for such fabric * * * if the standard or other regulation is designed to protect against the same risk of occurrence of fire with respect to which the standard or other regulation under this chapter is in effect unless the State or political subdivision standard or other regulation is identical to the Federal standard or other regulation.
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> * * * * *
>
> (c)(1) Upon application of a State or political subdivision of a State, the Commission may * * * exempt from subsection (a) * * * any flammability standard or other regluation of such State or political subdivision applicable to a fabric * * * subject to a standard or other regulation in effect under this chapter, if—

> (A) compliance with the State * * * requirement would not cause the fabric * * * to be in violation of the standard or other regulation in effect under this chapter, and
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> (B) the State * * * standard * * * (1) provides a significantly higher degree of protection from the risk of occurrence of fire * * *, and (ii) does not unduly burden interstate commerce.

The original 1967 preemption provision is ambiguous in that it does not expressly state which types of state action are preempted by the Act. It merely states that all inconsistent state laws are preempted. However, the 1976 amendment clarifies this ambiguity by replacing the term "law" with "flammability standard or regulation." This suggests that Congress merely intended to preempt inconsistent state statutory enactments rather than all state laws. This conclusion is bolstered by the legislative history under both the 1967 and 1976 preemption amendments. This legislative history indicates that Congress only intended to preclude inconsistent state statutory law which sought to establish specific regulations in the area of flammable fabrics. *To Amend the Flammable Fabrics Act: Hearings on S.1003 before the Consumer Subcomm. of the Senate Comm. on Commerce*, 90th Cong., 1st Sess. 157 (1967); 1976 U.S. Code Cong. & Ad. News 1009-10. Therefore, we find that Congress did not expressly intend to preempt state private civil remedies by its preemption provision.

However, this does not end our inquiry. We must also determine whether preemption of the punitive damages

remedy may be implied from the federal Act. There is some indication that Congress specifically did not intend to preempt any private civil remedies. First, 15 U.S.C.A. § 1199 (West, 1974), a subdivision of the Flammable Fabrics Act, provides in part.

> The provisions of this chapter shall be held in addition to, and not in substitution for or limitation of, the provisions of any other law.

It is arguable that this provision seeks to leave intact any state law which is not expressly precluded by the preemption provision. *See generally American Apparel Manufacturers Ass'n v. Sargent*, 384 F. Supp. 289, 290-91, n. 4 (D. Mass. 1974).

Furthermore, another federal act, although not directly applicable to the instant matter, is helpful in giving an indication of congressional intent in this area. In 1972, Congress enacted the Consumer Product Safety Act, 15 U.S.C.A. § 2051 et seq. (West, 1974). Congress made this Act applicable to the Flammable Fabrics Act by delegating the function of promulgating rules and regulations under the Flammable Fabrics Act to the Consumer Product Safety Commission, 15 U.S.C.A. § 2079. Section 2074(a) of that Act, entitled "Private Remedies," explicitly leaves intact liability at common law:

> Compliance with consumer product safety rules or other rules or orders under this chapter shall not relieve any person from liability at common law or under State statutory law to any other person.

This section makes it clear that for any action arising after the promulgation of this Act, there is no preemption of

private remedies, either compensatory or punitive. It also indicates that Congress never intended to preempt any privated remedies.

The United States Supreme Court has stated that where a challenged state law concerns the vital state interest of protecting its citizens from injury, it cannot be inferred that Congress deprived the states of the power to act in the absence of compelled congressional direction. *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959); *see Maurer v. Hamilton*, 309 U. S. 598 (1940) (state law protecting the safety of its citizens upheld although it arguably conflicted with federal law); *UAW v. Russell*, 356 U. S. 634 (1958) (state cause of action for compensatory and punitive damages for wrongful interference with lawful occupation deemed not preempted by the National Labor Relations Act); *Linn v. United Plant Guard Workers*, 383 U. S. 53 (1966) (state cause of action for compensatory and punitive damages for defamation uphe'd as not preempted by National Labor Relations Act). In *Russell* and *Linn*, the Supreme Court noted that the federal law's inability to provide for private relief, when state law was able to, vitiated the ordinary arguments for preemption, In *Linn*, the Court also stated that the federal law's inability to provide for relief aggravated the state's concern since a failure to redress an otherwise actionable wrong would create disrespect for the law.

In this case, the state punitive damages remedy concerns the vital state interest of protecting persons against personal injury. It seeks to protect state citizens from the willful, wanton, and reckless manufacture of a dangerously flammable fabric for use in children's sleepwear. The 1953 Flammable Fabrics Act did not seek to protect per-

sons from this particular risk. As stated earlier, the purpose underlying the original Act was primarily to prohibit the sale of highly flammable synthetic materials, not all unreasonably dangerous fabrics.

Furthermore, the 1953 Act did not provide private relief for personal injuries. In *Raymond v. Riegel Textile Corp.*, 484 F. 2d 1025 (1st Cir. 1973), the First Circuit determined that the imposition of compensatory damages on a defendant who had complied with the CS 191-53 test was not inconsistent with or preempted by the federal Act. The court reasoned:

> The Flammable Fabrics Act provides for inspection, seizure of materials, and criminal penalties, for violation of flammability standards promulgated by the Secretary of Commerce pursuant to 15 U.S.C.A. §§ 1193 and 1201. The Act makes no provision for private relief for those harmed in accidents involving flammable fabrics.
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> * * * * *
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> Since the Flammable Fabrics Act did not provide private civil remedies and does not preclude state development of such remedies, the states are not limited to applying the federal criminal and regulatory standards in civil cases involving burns from ignited fabrics.

484 F. 2d at 1026-28. Although this case dealt with the preemption of the remedy of compensatory damages, its reasoning is nevertheless applicable to the punitive damages remedy.

The case of *Northern States Power Co. v. Minnesota,*

447 F. 2d 1143 (8th Cir. 1971), *aff'd,* 405 U. S. 1035 (1972), is distinguishable. In that case, the court determined that a state law was preempted even though the state claimed that its law protected a vital interest in human safety. However, that case is unlike the instant matter because there the court determined that the federal government had an overriding concern in the regulation of nuclear activity. Furthermore, the federal regulation therein considered was pervasive and detailed. Additionally, the relevant federal agency had specifically sought to deal with the subject matter that the state was attempting to regulate through the issuance of a federal permit. The federal Flammable Fabrics Act of 1953 is different in nature. It does not deal with an area of traditional federal concern. Furthermore, the federal regulation is general in nature. It originally sought to prohibit the marketing of only a limited number of fabrics. Additionally, there were never any specific regulations promulgated under this federal law. Thus, this act is unlike the federal law addressed in the *Northern States Power* case which was all-encompassing and adequately sought to deal with the safety problems surrounding nuclear activity.

Since there is no clear congressional intent to preempt the private state remedy of punitive damages, we find that such preemption cannot be implied. We, therefore, reject Riegel's preemption arguments.

4. Riegel also contends that the trial court, in instructing the jury on the issue of punitive damages, applied an

incorrect legal standard and burden of proof.[5] Riegel argues that a "reckless disregard" standard was improperly applied and that the burden of proof on this issue should have been one of "clear and convincing evidence" rather than a "preponderance of the evidence." Riegel presents these arguments for the first time on appeal. These arguments were not raised at trial or in Riegel's post-trial motions.

In *Baldwin v. Chicago & N. W. Ry. Co.*, 285 Minn. 15, 20, 171 N. W. 2d 89, 92 (1969), this court cited with approval *Cole v. Lacey*, 252 Minn. 423, 433, 90 N. W. 2d 314, 322 (1958), in which we stated the following principle:

> [D]espite errors of fundamental law or controlling principle a trial court's charge to the jury becomes the law of the case and is not subject to attack or review on appeal when such fundamental errors have not been * * * called to the attention of the trial court * * * or have not, as a minimum requirement, been assigned for the first time as errors in motion for a new trial.

In accordance with this principle, we hold that the trial court's instructions cannot now be attacked by Riegel. The instructions constitute the law of the case and Riegel's

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[5]The trial court partially instructed the jury as follows:

> [I]f you find that any of these defendants acted either maliciously or in a wilful or wanton manner, you may * * * award * * * exemplary or punitive damages * * *.
>
> A "wanton" act is one which is done in a reckless disregard of the rights of others, evincing reckless indifference to consequences to the life or limb or health of another * * *.

The trial court used a preponderance of the evidence standard in instructing the jury on this issue.

subsequent arguments will be reviewed on the basis of the legal standard imposed by the trial court.[6]

5. In instructing the jury on the issue on punitive damages, the court listed several factors which the jury was to take into account in determining whether Riegel had acted in willful or reckless disregard of plaintiffs' rights:

> 1. The existence and magnitude of the product danger to the public;
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> 2. The cost or feasibility of reducing the danger to an acceptable level:
>
> 3. The manufacturer's awareness of the danger, the magnitude of the danger, and the availability of a feasible remedy;
>
> 4. The nature and duration of, and the reasons for the manufacturer's failure to act appropriately to discover or reduce the danger;
>
> 5. The extent to which the manufacturer purposefully created the danger;
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> 6. The extent to which the defendants are subject to federal safety regulation;
>
> 7. The probability that compensatory damages might be awarded against defendants in other cases; and, finally,
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> 8. The amount of time which has passed since the actions sought to be deterred.

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[6]We note that 1978 Minn. Laws, c. 738, § 4, which subsequently changed the law with respect to the legal standard for punitive damages, is not applicable in this case.

We have reviewed the entire record and, after taking into consideration the above-listed factors, have concluded that there was sufficient, in fact substantial, evidence for the jury to find that Riegel acted in willful, wanton and/or malicious disregard of the rights of others in marketing its flannelette.

The Danger

Plaintiffs introduced substantial evidence to show that thousands of people were dying or being seriously injured from cothing fires involving highly flammable fabrics each year. It was shown that the young and the very old were the most susceptible to these injuries. Furthermore, Dr. Johnson, at trial, demonstrated the instantaneous ignition and rapid burning rate of the untreated cotton flannelette manufactured by Riegel.

The Feasibility of Reducing the Hazard

As previously indicated, plaintiffs introduced a large amount of evidence showing that flame retardant products could have been applied to cotton flannelette well before Riegel manufactured the flannelette used in Lee Ann's pajamas. Of course, there was contrary evidence presented on this point by Riegel's witnesses, but plaintiffs' experts provided credible evidence.

However, even if such evidence had not been sufficient, there was sufficient evidence from which the jury could conclude that Riegel was strictly liable for its failure to warn.

> Under Minnesota law, a manufacturer has a duty to warn users of its products of all dangers associated

> with those products of which it has actual or constructive knowledge. Failure to provide such warnings will render the product unreasonably dangerous and will subject the manufacturer to liability for damages under strict liability in tort.

Karjala v. Johns-Manville Products Corp., 523 F. 2d 155, 158 (8th Cir. 1975); *see Magnuson v. Rupp Manufacturing, Inc.*, 285 Minn. 32, 38, 171 N. W. 2d 201, 205 (1969). The high flammability of Riegel's cotton flannelette is itself evidence of its duty in this regard. Furthermore, there was substantial evidence that Riegel was uniquely aware of these flammable characteristics.

Riegel did not seriously argue at trial that it was unable to provide a warning to the consumer, nor could it because plaintiffs introduced evidence that Riegel was able to send advertising information concerning the positive attributes of its product through the chain of commerce.

Riegel mainly argued at trial and argues here on appeal that it was not feasible to warn consumers because such a warning would "stigmatize" its product, thereby seemingly admitting that it was protecting the marketing of a product consumers might deem unreasonably hazardous.

Riegel's Knowledge

Riegel's knowledge of the hazard involved and its reason for not taking feasible measures to reduce this hazard was demonstrated at trial. In 1956, one of Riegel's top officials sent to the Riegel head of research a memorandum listing a number of clothing fires and consequent injuries which occurred to persons wearing Riegel flannel-

ette garments. This memorandum stated that the company was sitting on a "powder keg" with respect to the flammability of their flannelette. It was also proven at trial that between 1960 and 1967, Riegel was on notice that approximately 6 lawsuits were brought against it for accidents involving its cotton flannelette.

Riegel introduced a great amount of evidence showing its communications with several chemical companies concerning the availability of flame retardant products and the application of these products to its cotton flannelette. Riegel apparently introduced these items in an effort to show its good faith in attemting to find and apply a viable flame retardant to its cotton flannelette. However,, one of Riegel's own letters evidences the reason for its failure in this area. In April 1968, a letter from an official of Riegel explained that satisfactory runs were made with flame-retarded flannelette using various chemicals, but that Riegel was not going to use these products until federal law so required because of the cost factor. Plaintiffs' witnesses testified that the cost of flame-retardant fabrics would not make them unmarketable. Thus, it may be inferred from this letter that the decision not to use flame-retardant cotton flannelette was merely an economic one for the benefit of Riegel.

Plaintiffs' evidence also tended to prove that while Riegel conducted some surveillance of developments in the flame-retardant field, its efforts were minimal. Plaintiffs introduced evidence that prior to 1965, Riegel kept no record on its research and development of nonflammable products and fabrics. Furthermore, from 1967 to 1969, $140,000 was spent on research in this area while the entire research and deve'opment spending of the company amounted to $1,831,731.

6. Riegel contends that various policy considerations dictate against an award of punitive damages in this case. It argues that, in products liability cases where there is a potential for multiple plaintiffs, over-severe admonition and severe economic harship may result if punitive damages awards are allowed. This same criticism was made by Judge Friendly in the case of *Roginsky v. Richardson-Merrell, Inc.*, 378 F. 2d 832, 838-9 (2nd Cir. 1967). However, this argument has been consistently rejected by other courts and commentators who have considered this issue.[7] Owen discusses this point as follows:

> [A] contrary conclusion can be drawn from the MER/29 litigation, the only mass disaster products liability litigation that has run its course. While some 1,500 claims were filed against the manufacturer in that case, only eleven were tried to a jury verdict. Out of these only seven were decided for the plaintiff, and only three of these included awards for punitive damages, one of which was reversed on appeal. No doubt many claims were settled out of court. Yet if this is an example of the most crushing punishment that will befall a manufacturer guilty of flagrant marketing misbehavior—and it is difficult to imagine a more extreme case of such misbehavior than that of Richardson-Merrell in marketing MER/29—then the threat of bankrupting a manufacturer with puni-

[7] *See Drake v. Wham-O Mfg. Co.*, 373 F. Supp. 608 (E. D. Wis. 1974); *Sturm, Ruger & Co. v. Day*, 594 P. 2d 38 (Alaska 1979); *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967); *Rinker v. Ford Motor Co.*, 567 S. W. 2d 655 (Mo. Ct. App. 1978); Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257 (1976).

> tive damage awards in mass disaster litigation appears to be more theoretical than real.

74 Mich. L. Rev. at 1324-25.

Moreover, since Riegel's wealth or poverty and the degree to which it has already been punished was relevant in this case and will be relevant in future actions against it, Riegel is adequately protected against being overly punished for its misconduct.

Riegel also argues that there is no need for the deterrent of punitive damages in this case. Riegel contends that compensatory damages and loss of sales and reputation act as an adequate deterrent. Riegel also posits that since it no longer manufactures cotton flannelette and since the Flammable Fabrics Act presently has more stringent standards for children's sleepwear, no deterrent is needed. This argument ignores the fact that Riegel was shown to have acted in reckless disregard of the public for purely economic reasons in the past. A punitive damages award serves to deter Riegel from acting in a similar manner with respect to other products manufactured by it in the future. Furthermore, since the potential of compensatory damages awards and loss of sales and reputation did not serve to deter Riegel in the past, Riegel cannot now argue that these considerations act as an adequate deterrent.

Riegel also overlooks the fact that one of the functions of a punitive damages award is to punish past misconduct. This function is well served by a punitive damages award in this case.

7. Riegel contends that the punitive damages award of $1,000,000 was clearly excessive. This court has stated

that it will not disturb a punitive damages award unless it appears that the award was actuated by passion and prejudice and is so excessive as to be deemed unreasonable. *Hammerstein v. Reiling*, 262 Minn. 200, 115 N.W. 2d 259 (1962). We have reviewed the record in this case and find that the punitive damages award is not unreasonable in light of the evidence presented.

The evidence shows that Riegel created a substantial danger to the public by marketing its highly flammable cotton flannelette. Riegel continued to market this product even though there were economically feasible measures which could have been taken to reduce this danger to a fairly acceptable level. The evidence also showed that Riegel was aware of the danger and the means for reducing this danger. Furthermore, Riegel is a multi-million dollar corporation which reaped substantial profits through the sale of its highly flammable cotton flannelette. We, therefore, do not find that the punitive damages award was excessive as a matter of law.

8. Riegel argues that, under the principle of *Magnuson v. Rupp Manufacturing, Inc.*, 285 Minn. 32, 171 N.W. 2d 201 (1969), Riegel cannot be held strictly liable in this case. In *Magnuson*, this court held that, in a strict liability case, a "*plaintiff must not be aware of the defect in order ro recover.*" 285 Minn. at 40, 171 N.W. 2d at 207. Riegel claims that since Jacquelyn admitted at trial that she was aware that fabric burns, and since cotton fabric is a "natural," commonly-used product which everyone knows will burn, liability is precluded.

The argument misconstrues the nature of the claimed defect in this case. Plaintiffs claimed that Riegel's untreated cotton flannelette was defective not simply because

it burned but because it was of such a construction that it ignited instantaneously and burned at an amazing degree of rapidity and at an extremely high temperature. They presented evidence tending to establish that the consuming public was unaware of these extremely flammable characteristics. It is certainly inferrable that the consuming public was not aware that Riegel's flannelette had substantially similar burning characteristics to newspaper. Thus, the jury was justified in finding that Riegel manufactured a defective product and that the defect was unknown to plaintiffs and the consuming public.

9. In a special interrogatory, the jury was asked whether the cotton flannelette was defective when it left the possession of Riegel and whether that defect caused the injuries to Lee Ann. In subsequent interrogatories, the jury was asked whether the cotton flannelette *pajamas* were defective when they left the control of the settling defendants—the garment manufacturer (Style Undies, Inc.), the wholesaler (Associated Merchandising Corporation [AMC]), and the retailer (Dayton-Hudson Corporation.)[8] The jury found that the flannelette was defective when it left the control of Riegel and that this defect caused Lee Ann's injuries. It also found that the flannelette *pajamas* were defective when they left the control of the settling defendants, but that this defect did *not* cause the injuries.

Riegel argues that these jury findings are inconsistent because the defect which the jury found not to have caused

[8]Defendants Style Undies, Inc., AMC, and Dayton-Hudson Corporation all settled with plaintiffs prior to trial and Perringer releases were given. Therefore, special interrogatories were asked of the jury concerning those defendants so that each defendant's fault could be compared.

the injuries with respect to the settling defendants *must have been* the same defect which the jury found to have caused the injuries with respect to Riegel.

The trial court, in its post-trial memorandum, explained why the opposite findings on the cause question are consistent in this case:

> The defendant Riegel was found to be strictly liable for producing a defective material which caused the injuries to Lee Ann Gryc. The liability of Riegel was on the basis of the fabric alone. The Court changed the questions for the defendants Dayton —, AMC, and Style Undies so that the jury would have an opportunity to determine whether there might be some liability on the part of these defendants for having changed the fabric in some way, or for the manner in which they moved it through the stream of commerce, which might have caused the injury to Lee Ann. The Court was careful to change the questions relating to the settling defendants from cotton flannelette which left the possession of Riegel to cotton flannelette pajamas which left the possession of the various other defendants, thus giving the jury the opportunity to determine whether design features in the pajamas or anything else may have caused the injury to Lee Ann. The jury, with unusual discernment, realized that the cotton flannelette moved through the stream of commerce, but that it was the cotton flannelette in its highly flammable state which caused the injury, not the movement through the stream of commerce. It also recognized that the design of the pajamas had nothing to do with causing the injury to

> Lee Ann, and, consequently, it correctly answered Questions 3, 5, and 7 Yes, thus finding that the pajamas were in a defective condition unreasonably dangerous to consumers because of the condition of the fabric alone, and also correctly answered Questions 4, 6, and 8 No, thus finding that nothing the other defendants had done was a cause of the injury to Lee Ann.

The trial court's findings are consistent with the evidence adduced at trial. The jury verdict will not, therefore, be disturbed.

10. During the trial, the trial court ruled as a matter of law that Jacquelyn Gryc could not be comparatively at fault for the claimed injuries to her daughter, Lee Ann. It based this ruling on the doctrine of parent-child tort immunity. The court, therefore, dismissed Riegel's counterclaim against Jacquelyn Gryc with respect to Lee Ann's claim. However, the question of Jacquelyn's comparative fault was submitted to the jury with respect to Jacquelyn's individual claim. The jury found Jacquelyn not to be at fault and awarded her $1,000 in damages.

Riegel claims that the trial court erroneously determined that Jacquelyn Gryc was immune from fault for her daughter's claim. The question of Jacquelyn's comparative fault was submitted to the jury even though in the context of another claim. The jury found her to be free from fault. It would have been inconsistent if the jury had found Jacquelyn comparatively at fault in the context of one claim but not the other. Therefore, the jury's finding of nonfault is equally applicable to both claims and there could not be harmful error in the dismissal of the counterclaim.

11. Prior to the conclusion of the trial, the trial court directed a verdict in favor of Lee Ann on the issue of her comparative fault. The court, however, submitted the question of Lee Ann's fault to the jury so that the need for a retrial would be obviated in the event that this court reversed the trial court on this point. The jury returned a verdict finding Lee Ann 10-percent at fault. In light of its prior ruling, the trial court found Riegel to be 100 percent at fault.

The trial court ruled that Lee Ann could not be at fault as a matter of law on the basis of *Toetschinger v. Ihnot*, 312 Minn. 59, 250 N.W. 2d 204 (1977). In *Toetschinger*, this court held, in a 5-4 decision, that the plaintiff, a boy of approximately 5 1/2 years, could be found to be 80-percent negligent for darting out into the street in front of a moving vehicle. In so holding, the majority refused to adopt the "Illinois Rule" that a child of less than 7 years in age could not be contributorily negligent as a matter of law. However, the court limited its holding by the following statement:

> The trial judge, who has the opportunity of observing the situation firsthand, can direct that the child involved, because of tender years, inexperience, or the subtleties of the danger to be apprehended, cannot be held to be contributorily negligent under the circumstances of the given case.

312 Minn. at 69, 250 N.W. 2d at 210.

Riegel argues that the facts of this case are analogous to those of *Toetschinger*. In *Toetschinger*, the majority based its holding on the finding that a 5 1/2-year-old child had the capacity to appreciate and avoid the risks of moving

traffic. Riegel argues that in this case, Lee Ann, a child of 4 years, 10 1/2 months, was capable of understanding the danger incident to being near or on a stove. However, the relevant danger in this case is not simply the danger of being near a stove. The danger to be comprehended was the highly flammable nature of the cotton flannelette pajamas worn by Lee Ann. It was within the sound discretion of the trial court to determine that Lee Ann was incapable of appreciating the risks attendant upon her actions; namely, that her pajamas would ignite immediately and burn rapidly when they came in contact with the electric burner. Therefore, we uphold the trial court's determination that Lee Ann was not comparatively at fault as a matter of law.

12. Riegel claims that the trial court committed numerous other errors at trial. Riegel also contends that plaintiffs' counsel engaged in many acts of misconduct which served to deny Riegel a fair trial. We have reviewed these contentions carefully and find that Riegel's arguments are without merit.

13. Riegel argues that the compensatory damages award of $750,000 is excessive as a matter of law. However, we find the award is not so excessive as to be deemed unreasonable in light of the evidence presented.

As a result of the incident, Lee Ann suffered second and third-degree burns over a 20-percent area of her body. Lee Ann was hospitalized for her injuries and went through painful skin grafting procedures. She underwent other treatment procedures which continued for 2 months after she was released from the hospital. During the early treatment, Lee Ann required morphine injections for her severe pain.

Lee Ann's scars are permanent. The scar tissue is different from normal skin in that it is less elastic and of a different color. The skin is about one-half the thickness of normal skin and has no hair follicles, lubricating and sweat glands, or sensory apparatus. There is a distinct asymmetry in the development of Lee Ann's breasts as a result of her scars. The right breast is significantly smaller than the other and there is particular destruction of the right nipple. Lee Ann will require at least six episodes of surgery in her adult life because there will be future breakdowns in the scar tissue and because there is a possibility of future ulcerations and other benign or malignant growths.

The testimony indicated that this permanent disfigurement may adversely affect Lee Ann's psychological make-up, and her employment and matrimonial opportunities. The evidence also showed that Lee Ann is presently a constricted girl who has a low self-image and is unable to deal with the emotional problems caused by her burns. Lee Ann's nicknames at school are "Kentucky Fried Chicken" and "burnt toast."

Plaintiffs' testimony indicated that the sum total of Lee Ann's future medical costs relating to her injuries would be in the area of $8,500. Therefore, we are not unmindful of the fact that a large portion of the jury award is attributable to pain and suffering damages. However, when this award is viewed in the context of the severe disfigurement which Lee Ann will have to live with for the rest of her life, this award cannot be found to be excessive as a matter of law.

The judgment is, therefore, affirmed.

Affirmed.

(PETITION DENIED)

STATE OF MINNESOTA
OFFICE OF CLERK OF SUPREME COURT

ST. PAUL, MINN.

LEE ANN GRYC, by her mother and natural guardian, JACQUELYN GRYC, and JACQUELYN GRYC, individually,

Respondents,

vs.

DAYTON-HUDSON CORP., et al,

Defendants,

RIEGEL TESTILE CORP.,

Appellant.

July 10, 1980

49334 and 49525

SIR:

You will take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,

JOHN McCARTHY
Clerk Supreme Court

STATE OF MINNESOTA
County of Ramsey

DISTRICT COURT
Second Judicial District

LEE ANN GRYC, by her mother and natural guardian, JACQUELYN GRYC, and JACQUELYN GRYC, individually,

Plaintiffs,

vs.

DAYTON-HUDSON CORPORATION, a Minnesota corporation; STYLE UNDIES, INC., RIEGEL TESTILE CORPORATION; and ASSOCIATED MERCHANDISING CORPORATION,

Defendants.

ORDER & MEMORANDUM

File No. 407340

This matter was heard by the undersigned on July 25, 1978, and July 24, 1978, pursuant to a motion by the defendant Riegel Texitle Corp. for an order setting aside the Findings of Fact of the Jury and Conclusions of Law and Order for Judgment and granting judgment to the defendant Riegel n.o.v., or, alternatively, for an order amending the Findings of Fact, Conclusions of Law, and Order for Judgment, or for a new trial on all issues. On July 5, 1978, the moving party was represented by Robert C. Holtze, Esq., and Todd Henshaw, Esq.; plaintiffs appeared by Richard Baldwin, Esq., and James R. Tschida, Esq.; also present, as observers and auditors, were John M. Kennedy, Esq., James S. Simonson, Esq., Jeffrey

R. Brooke, Esq., and Charles Stewart, Esq.; on July 24, 1978, the moving party appeared by Robert C. Holtze, Esq., Todd Henshaw, Esq., and Donald M. Jardine, Esq.; plaintiffs appeared by Richard Baldwin, Esq., and James R. Tschida, Esq.; also present, as observers and auditors, were James S. Simonson, Esq., and Charles Stewart, Esq.; and the Court, having heard the arguments of counsel, and having read all of the extensive briefs, articles, and appendices provided by counsel, and being duly advised in the premises, now makes the following order:

IT IS ORDERED that the motion of the defendant Riegel Textile Corp. is hereby in all things denied.

IT IS FURTHER ORDERED that, there being no just reason for additional delay in the entry of judgment, no further stay of entry of judgment shall be granted and final judgment may be entered forthwith.

The Memorandum attached hereto is made a part of this Order.

Dated: August 7, 1978.

/s/ HYAM SEGELL
Judge of District Court.

MEMORANDUM

This matter is before the Court pursuant to a motion by the defendant Riegel Textile Corporation for an order setting aside the Findings of Fact, Conclusions of Law, and Order for Judgment heretofore entered and granting judgment to defendant Riegel notwithstanding the verdict, or, alternatively, for an Order for Amended Findings of Fact, Conclusions of Law, and Order for Judgment, or for a new trial on all issues. Defendant has recited a multiplicity of

grounds in support of the motion. In a case that was very clearly tried, with very few serious objections directed to the admissibility of evidence, broad and sweeping claims of error attributed to the Court and plaintiffs counsel can-only be characterized as microscopic captiousness upon the part of counsel for the defendant who finds himse'f staring into the wrong end of a $1,750,000.00 verdict. A careful examination of the grounds in support of the motion reveals that they are generally without substance or merit. Because of the importance of the case to both sides and the likelihood of appeal, the Court feels that it is incumbent upon it to make certain observations concerning a few of the claims made by the defendant in its motion. The presentation of these items is not necessarily in the order of their importance.

I

STATEMENT OF FACTS

By way of introduction, a brief statement of the facts is probably in order. On December 9, 1969, Lee Ann Gryc, who was then just shy of five years old, was watching television in her living room during the early daytime morning hours. She was attired at the time in cotton flannelette pajamas. Her father was still in an upstairs bedroom, and her mother was in the basement preparing to do some laundry. An electric stove in the kitchen was on because the mother was cooking some food for the evening dinner; a timer which was located above the stove had been previously set by the mother. When Lee Ann Gryc heard the timer start to buzz, she went into the kitchen and apparently climbed upon a chair to turn the timer off;

at that time her pajama was ignited, burned very rapid'y, and caused severe burns over the upper half of her body, horrible disfigurement, and deep psychological trauma, which is still evident today. There were no witnesses to the accident, and the plaintiff Lee Ann Gryc was unable to described it because at the time of the trial, nine years later, she had very little memory of the events of that day. There was no negligence on the part of either parent in connection with the accident. One fact was made brutally clear, however, and that is that there was an instantaneous ignition of the pajama and a rapidity of burning which was almost beyond comprehension. The case was submitted to the jury upon the issue of strict liability under Section 402A, Restatement of the Law of Torts, 2nd Edition, and upon the issue of punitive damages, since the evidence disclosed that the defendant Riegel Textile Corporation had acted in reckless disregard of the rights of the consuming public in continuously producing a cotton flannelette which was unreasonably dangerous to the public, known by it to be dangerous, and for which danger there was a known feasible remedy.

II

THE PRETRIAL CONFERENCE

Since this case appeared to involve some complex legal and technical issues, an informal pretrial conference was conducted on Tuesday, April 25, the date of trial. Informally—and that word should be emphasized—certain ground rules were laid for the introduction of evidence, discussion was had as to the time frame to which the introduction of evidence would be limited, and, to the recollec-

tion of the Court, it was generally agreed by both sides that evidence of events before the accident and to the date thereof would be admissible and evidence of events taking place thereafter would be inadmissible; since this was a "state of the art" case, such a time frame would be beneficial to both sides. For example, plaintiffs benefited by such a time frame since it foreclosed the introduction of evidence concerning an additive known as "Tris," which recent investigation proved to a cancer-causing agent and which, incidentally, would have been outside the scope of the issues of this lawsuit. The defendant benefited by such a time frame because it was able to limit to the date of the accident the number of additional cases that had been brought against it; thus, when a stipulation was finally reached concerning the introduction of other incidents of the same kind, the defendant was able to eliminate numerous cases which had been served and filed after the date of the incident here in issue. The Court did allow some spillover on the part of the defendant beyond the December 9, 1969, accident date in instances where an activity had been generated prior to that date and continued beyond it; the Court also allowed the defendant to refute the fire statistics which were available prior to December 9, 1969, in order to show what it claimed was the exaggeration and invalidity of those statistics; however, generally, the December 9, 1969, date was adhered to.

No formal requests were made on behalf of defendant Riegel on the record that the Court use the term "product liability" as opposed to "strict liability." The Court agreed informally not to use the term "strict liability," but that

ended the matter on an informal basis. No formal motion was made, moreover, to refer to defendant Dayton-Hudson Corp., Style Undies, Inc., and Associated Merchandising Corp. as "the settling defendants," although some informal discussion was had in regard to that. A court reporter was available at all times, as Mr. Holtze suggests in his affidavit; however, no request for his services was made and no recording was made of the informal discussion setting down the ground rules for the trial, even though defense counsel went on the record in many chambers discussions thereafter. Some discussion was had concerning experimentation, and the Court concluded that experimentation should be in a controlled setting; however, late in the trial, the Court relented and, upon assurance by all counsel that any experiments involving fire would not endanger the courtroom, did permit both sides to conduct experiments. The ruling on the videotaped experiment by the defendant had nothing to do with the informal discussion relating to experiments in controlled settings, because the defendant had violated Rule 26.02, M.R.C.P., and it was for that reason that the videotaped experiment of Mr. Lund was declared inadmissible. The point was that defense counsel simply had not seen fit to notify plaintiffs' counsel that he proposed to conduct an experiment outside of the courtroom, during the latter stages of the trial, for use in the courtroom, which experiment was conducted by an expert witness. Trial by surprise was abandoned in Minnesota on January 1, 1952, and this Court will not permit it, especially where it appears to be an intentional and blatant violation of M.R.C.P. However, if there was any prejudice in refusing to allow this experiment, it was obviated by the fact that

the Court did permit a similar experiment to be conducted in the courtroom by a lawyer using a hot plate.

III

MISCONDUCT OF PLAINTIFFS' COUNSEL

Defendant makes numerous references to plaintiffs' closing argument in its motion and memorandum covering misconduct. The difficulty with the defendant's position in this regard is that there were only two occasions in which the defendant interrupted plaintiffs' counsel. The first appears at page 34 of the transcript of Mr. Tschida's argument, where Tschida referred to burns that he had viewed during the time of the Korean War when he was in Texas in a Burn Unit. Mr. Holtze, defense counsel, objected upon the grounds that it was getting "outside the scope of this case," and the Court indicated that it was. The second interruption came at page 37 of Tschida's argument, where defense counsel objected to a reference that a breast removal was one of the greatest catastrophic emotional experiences for a woman. That was objected to as being "beyond the scope of the testimony," and while there had been testimony relative to the possibility of cancer where most of the skin tissues had been burned away, the Court did sustain the objection. Neither of these items could be said to be seriously improper in argument, nor prejudicial to the defendant, and no request was made by the defendant for any corrective instruction.

As was said in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 243:

> "If every remark made by counsel outside of the testimony were grounds for a reversal, comparatively

few verdicts would stand."

Today counsel has numerous other complaints about the plaintiffs' argument; however, at no time did he complain about them at trial. No other interruptions were made of plaintiffs' closing argument, no exceptions were taken at the conclusion of plaintiffs' argument, and no corrective instructions were sought following it. Thus, the claim of misconduct is not subject to review at this point. No intemperate language was used by plaintiffs' counsel and no appeal to passion and prejudice was made. It is the conclusion of the Court that the defendant simply could not be prejudiced by the argument. After all, an argument is just that. The Court carefully cautioned the jury about any misstatements of fact or misstatments of law and has a right to assume that the jury followed those instructions. Moreover, the instructions of the Court were given orally and *in writing*, so that if there was anything that the jury did not understand during the course of oral instruction, it had an opportunity in the jury room to review the instructions to determine their applicability to the facts and the case as a whole. It might be noted also that the submission of the charge in writing was through stipulation of both counsel.

The claim of prejudice arising from the withdrawal of the mother's claim for medical expenses is treated in the Miscellaneous portion of this Memorandum.

The claim of defendant that there was misconduct of plaintiffs' counsel during interrogation of witnesses at trial is utterly without merit.

IV

THE COURT'S CHARGE

A. REQUESTED INSTRUCTION.

The defendant requested that the Court give an instruction on superseding cause. As it turned out, with the jury finding that the mother was not negligent, no prejudice could accrue from the failure to give such an instruction. In any event, however, the Court is satisfied that an instruction on superseding cause was not applicable to this case. At best, if the mother had been negligent, such negligence could only have been a concurring cause in the accident which occurred on December 9. That cause could only have concurred with the cause of the defect in the material, rather than superseded that cause, and both would then have produced the accident. But the question is moot since the jury found that the mother was not negligent.

B. THE CS 191-53 INSTRUCTION.

The defendant contends at page 4 of its memorandum relating to the Court's charge and at page 6 of its memorandum relating to punitive damages that the Court failed to charge that compliance with the Flammable Fabrics Act and the CS 191-53 test could be considered by the jury as evidence that the cloth was not defective. In the punitive damages memorandum, the defendant omits the key portion of the charge which recited the precise statement which it now claims the Court failed to give. If the whole instruction on the CS 191-53 test is examined, it will be seen that the Court correctly charged

the jury that the test could be considered in determining whether the cotton flannelette was in a defective condition unreasonably dangerous to users, or consumers. That instruction reads as follows:

> "Now, repeated reference has been made in this case to a test called CS 191-53, which is part of the Flammable Fabrics Act of 1953 as amended, and it is contended by the defendant Riegel Textile Corporation that the cotton flannelette manufactured by it was in compliance with that test; however, since the Flammable Fabrics Act is a criminal statute, compliance with that test is not the standard by which the conduct of the defendant Riegel Textile Corporation is to be measured.
>
> "As I told you before, the conduct of the defendant Riegel Textile is to be measured by whether the cotton flannelette was in a defective condition unreasonably dangerous to users, or consumers, at the time it left the factory. In reaching your conclusion on that point, *you will consider, examine, and weigh with care all of the evidence in the case, including the CS 191-53 test,* to determine whether the cotton flannelette failed to perform reasonably, adequately, and safely as pajamas, or sleepwear, in a setting in which it might be accidentally exposed to heat or flame." [Emphasis supplied] [Transcript of the Jury Charge, page 20]

The interesting part about the defendant Riegel's present position about the Court's charge is that most of the things about which it now complains were not even re-

quested by it prior to the charge to the jury. Moreover—and this is crucial—defense counsel had no complaints about the Court's charge immediately following it, and that charge became the law of the case; hence, his present complaints, except for those which were protected by a prior requested instruction, are totally without substance and are not subject to review.

V

RULINGS OF THE TRIAL COURT

A. FLAME RETARDANT TREATMENTS.

Evidence was introduced by the plaintiffs that there were flame retardant treatments which were both feasible and commercially available during the time frame. Defendant now contends that because of the time frame it was precluded from offering evidence that neither of the commercially available products were used up to the date of trial by any manufacturer. However, it offered no evidence in that regard and made no offer of proof that it had such evidence, so far as the Court recollects. Had such evidence been offered or an offer of proof been made, the Court almost certainly would have excluded it on the basis of the time frame ruling. However, as the Court presently views it, evidence of this kind, had it been introduced, might very well have increased the punitive damages, because the jury would then have known that the company had continued to refuse to employ a commerically available flame retardant down to the date of trial. Such fact, if known to the jury, might very well have proved to be more prejudicial than beneficial.

B. CS 191-53 TEST.

The defense of this case was based almost solely upon the defendant's compliance with the federal Flammable Fabrics Act of 1953. Pursuant to that act, a test was promulgated known as CS 191-53 for testing the flammability of various fabrics. The record is replete with various descriptions of the test by all of the experts, and because the defendant obviously placed such reliance on this test, plaintiffs were properly permitted to attempt to demonstrate the invalidity of that test. No one who sat through the trial could believe anything else than that the test served no useful purpose in determining flammability of cotton flannelette. The evidence so overwhelmingly established this fact as to make it almost conclusive; moreover, it was equally plain from the evidence that the defendant knew the test was invalid; that was clear from an interdepartmental memorandum dated May 2, 1956, some three years following the passage of the Flammable Fabrics Act and use of CS 191-53, in which it was said by the writer:

> "We are always sitting on somewhat of a powder keg as regards our Flannelette being so inflammable." [Pl. Exh. AO]

That memorandum was largely responsible for heavy punitive damages in this case, since it was a key factor in demonstrating knowledge on the part of the defendant that, notwithstanding the fact that its flannelette met the standards of CS 191-53, it was dangerously flammable and represented a severe hazard to the public.

C. LIMITATIONS ON LUND TESTIMONY.

The Court refused to permit the witness Lund to testify concerning the kind of burns that might have resulted if the plaintiff had been wearing a pajama treated with a commercially available flame retardant. There was, of course, no foundation for this testimony, nor could the defendant supply any, and the background of the witness, which was non-medical, precluded him from testifying as to what might have happened had the plaintiff been burned wearing such a fabric. There was simply no way that the witness could qualify for such testimony, and it would have been the sheerest speculation on his part to testify as to the effect of the burns on a child similarly situated to the plaintiff. Aside from its speculative aspect it would have been based solely upon hearsay as well.

VI

LIABILITY AND COMPENSATORY DAMAGES

A. LIABILITY OF RIEGEL.

No useful purpose would be served by further enumerating the facts of this case. Suffice it to say that the plaintiff Lee Ann Gryc was seriously burned in the accident that took place on December 8, 1969, was left with horribly disfiguring scars, and that the accident was clearly caused by defendant's fault. A few things stand out in the Court's mind concerning the issue of liability. The first is the astonishing rapidity with which the cotton flannelette from which Lee Ann's pajamas were made, burned. The second is the fact that the defendant Riegel Textile Corporation had full knowledge of the dangerous aspect

of this cotton flannelette and continued to manufacture it in increasing millions of yards; the evidence that fully supports such knowledge lies in the "powder keg" memo previously mentioned; in fact, that memo, when coupled with the Johnson movie, is probably the key item of evidence in establishing the liability of Riegal for both compensatory and punitive damages in this case. Third is the fact that Riegel hid behind the CS 191-53 test in contending its fabric was safe, indulging in the false pretense that this test had validity in testing flammability of fabrics knowing that pretense to be false. The evidence clearly disclosed that the CS 191-53 test served no useful purpose in testing the flammability of fabrics. As a matter of fact, burning newspaper would pass the test. There is no doubt in the Court's mind that the defendant Riegel Textile Corporation acted in reckless disregard of the rights of the public in producing this product and was clearly strictly liable within the purview of Section 402(a) of the Restatement of Torts. The powder keg memo and an examination of the movie prepared by Professor Johnson would, without more, suffice to establish that conclusion. This Court has tried numerous product liability cases, but has to say that the evidence in this case established the most overwhelming case of liability this Court has heard, and the defense offered no *credible* evidence to the contrary.

B. LIABILITY OF OTHER DEFENDANTS.

Because of the overwhelming case of liability against Riegel, the answers of the jury as to the other defendants, Dayton-Hudson Corporation, Associated Merchandising Corporation, and Style Undies, Inc., are completely con-

sistent with the evidence. The defendant Riegel was found to be strictly liable for producing a defective material which caused the injuries to Lee Ann Gryc. The liability of Riegel was on the basis of the fabric alone. The Court changed the questions for the defendants Dayton's, AMC, and Style Undies so that the jury would have an opportunity to determine whether there might be some liability on the part of these defendants for having changed the fabric in some way, or for the manner in which they moved it through the stream of commerce, which might have caused the injury to Lee Ann. The Court was careful to change the questions relating to the settling defendants from cotton flannelette which left the possession of Riegel to cotton flannelette pajamas which left the possession of the various other defendants, thus giving the jury the opportunity to determine whether design features in the pajamas or anything else may have caused the injury to Lee Ann. The jury, with unusual discernment, realized that the cotton flannelette moved through the stream of commerce, but that it was the cotton flannelette in its highly flammable state which caused the injury, not the movement through the stream of commerce. It also recognized that the design of the pajamas had nothing to do with causing the injury to Lee Ann, and, consequently, it correctly answered Questions 3, 5, and 7 Yes, thus finding that the pajamas were in a defective condition unreasonably dangerous to consumers, because of the condition of the fabric alone, and also correctly answered Questions 4, 6, and 8 No, thus finding that nothing the other defendants had done was a cause of the injury to Lee Ann. This was completely consistent with the testimony adduced at the trial. All other ques-

tions submitted to the jury on issues of liability resulted in answers consistent with the testimony, with the sole exception of the question relating to Lee Ann's negligence. The Court had previously determined that Lee Ann could not be negligent as a matter of law, but submitted that question solely for appellate purposes and to avoid the prospect of a new trial if there were a reversal. The answer of the jury that the mother of Lee Ann Gryc was not negligent was completely consistent with the testimony. The deposition testimony of Mrs. Gryc's former husband, who was an alcoholic, simply was not credible on the point of whether she had told Lee Ann to turn off the timer on the stove. No one sitting in the courtroom could have believed that testimony, and the jury also recognized its incredibility.

C. COMPENSATORY DAMAGES.

Defendant complains that the compensatory damages awarded to Lee Ann Gryc were excessive.

On page 3 of defendant's memorandum on excessive damages, reference is made to settlement negotiations, which the Court views as a highly improper reference in an argument on excessive damages. The Court had no knowledge of any settlement negotiations as set forth in that statement, except a statement on the record by the plaintiffs at the outset of the trial that the demand was $307,500.00, and since such references do not bear on the issue of whether the damages are excessive, they should not be included in an argument on excessiveness.

There is no question but what Lee Ann suffered enormous injuries and indescribable pain in the treatment of

those injuries. Third degree burns leave litt'e on the body except bones and some muscle, and the terrible consequences of these injuries have left Lee Ann with two permanent disabilities: one, the hideously disfiguring scars which she will bear for the rest of her life, which, incidentally, afford her little protection from the elements and the risk of cancer, and, two, the psycho'ogical damage, which was evident from her testimony and the expert testimony of members of the medical profession, which also will continue for the balance of her life. This, in the Court's judgment, is the element which probably received the most attention from the jury. A young lady, and even an adult woman, whose breasts are deformed and scarred is going to suffer psychological trauma that is almost inconceivable and beyond measurement. Who is to say that the damages awarded in this case are excessive? While the compensatory award may be generous, it cannot be said to be so unfair or unreasonable that it should be cut back; nor was it rendered by reason of passion or prejudice. This Court has observed on many occasions that too often trial and appellate judges play the role of super jury. This is an unwarranted incursion into the role of the jury and a pasttime in which this Court will not indulge. The compensatory award of the jury, accordingly, must stand.

In allowing the jury verdict to stand, the Court is mindful of the fact that the primary basis for that award was for past and future pain and suffering and permanent disability, there being little evidence regarding the plaintiff Lee Ann's loss of future earning capacity. Thus, the principles enunciated in *Busch v. Busch Construction, Inc.*, — Minn. —, 262 N.W.2d 377, are particularly ap-

plicable to this case. That case expressly overruled *Hallada v. G. N. Ry. Co.*, 244 Minn. 81, 69 N.W.2d 673. *Hallada* suggested that injury awards must be tested by determining "what the total amount of damages awarded by the jury will accomplish for [plaintiff] if conserved and used with ordinary prudence." That concept was expressly rejected in *Busch* when the court said:

> ". . . An award for pain and suffering is a separate and distinct item of damage. The purpose of giving damages for pain and suffering is to compensate the injured party for his loss, not to reimburse him for his future expenses."

That statement distinctly and clearly enunciates the principle that damage awards are not to be tested on the basis of what financial benefits they might reap when invested at normal rates of interest.

The court went on to say in *Busch* that awards for general damages, including those for pain and suffering, are "generally left to the discretion of the jury and trial court."

Additionally it said:

> "The judicial function of determining the amount of a verdict in a personal injury case has been historically reserved to the jury. In this case the trial judge did not reduce the award for pain and suffering . . . [and] Appellate courts are not prone to interfere unless it clearly appears that there has been an abuse of judicial discretion."

Applying these principles to the case at hand, it is clearly seen that the jury award of compensatory damages

cannot be disturbed. See also *Anunti, et al v. Payette,* — Minn. —, — N.W. 2d —,

Filed June 9, 1978.

VII

MISCELLANEOUS

A. ADJUSTMENT OF JUDGMENT.

Defendant contends that it is entitled to an adjustment of the judgment because of prior settlement by other defendants under M.S.A. 604.01[5]. That section is not applicable to it because Riegel has not paid any prior settlements or payments or advance payments for which it would be entitled to an adjustment. *Anunti, et al v. Payette,* supra.

B. ANIMUS.

There was a lot of personal animosity in this case throughout the trial, primarily because counsel on both sides refused to treat each other with professional courtesy and in some cases the defendant refused to abide by the Rules of Civil Procedure for Minnesota. A good example of this was the surprise videotape of the witness Geoffrey Lund, and at least on one occasion refusing to make documentary discovery, necessitating plaintiffs' lawyers looking for documents in the office of another lawyer in California. Even after the documents were discovered in California, there was quibbling about foundation for their introduction. See Transcript of Dale W. Kern, pages 83-95. Some of that animosity still prevails in this motion, in statements that are made about plain-

tiffs' counsel. This Court has not particularly appreciated the personal attacks that have been made by both sides against each other and has dismissed a lot of the material in defendant's memoranda because it is not legal justification for a new trial, but simply a personal attack upon counsel.

C. WITHDRAWAL OF MOTHER'S CLAIM.

One of the claims of defendant is that it was prejudiced by the argument of plaintiffs' counsel when the mother's claim for her daughter's medical expense was withdrawn. [Tschida Final Argument, page 3] This came as a complete surprise to the Court and to defendant's counsel, and while the Court was deeply distressed by what appeared to be an utter lack of professional sensitivity, and expressed its displeasure to counsel following his argument, it is quite clear that the contention of the defendant that it was prejudiced is without foundation and without merit. What was really distressing to the Court was the fact that it had spent all three weekends of the weeks of trial preparing the Findings and its charge covering those issues that had been tried and upon which there was agreement for submission, and all of the lawyers and the Court had spent several hours discussing these proposed Findings and charge, all of which would have required substantial revision if the claim were actually withdrawn. It was not a matter that was apparently troubling to defense counsel, because it was the Court *sua sponte* that raised the issue in chambers following plaintiffs' argument. Only after that did defense counsel express his displeasure on the record and make a statement which indicated that it

was an attempt to avoid the comparison of causal fault of the mother with other defendants. [Tschida Final Arment, page 55] The Court thereafter determined that it would not permit plaintiffs' counsel to withdraw the claim and prepared a corrective instruction which was given without objection by the defendant. As a matter of fact, the defendant concurred in the idea that such an instruction should be given. [Tschida Final Argument, page 53] However, it is a fact that the defendant failed to object to the instruction as given, which forecloses it at this time from contending that it was prejudiced. If there was prejudice, the totality of it must be measured by the jury's award of $1,000.00 to the mother. That sum is so miniscule when compared to the sums awarded to the daughter, and it would seem to the Court that it would be difficult to make a serious contention that the withdrawal of the mother's claim could in any way affect the awards made to the child, except for the possibility that the child's awards were reduced by $1,000.00. By refusing to allow withdrawal of the claim, the Court also avoided defendant's claim that the comparison of fault, with the mother included, would be eliminated. Since that comparison was made, there was no prejudice to defendant.

VIII

PUNITIVE DAMAGES

A. HISTORY IN MINNESOTA.

Minnesota has long recognized awards for punitive damages where wrongful conduct has been done wilfully, wantonly, or maliciously. Dun. Dig. [3rd Edition] Section

2540. An award of punitive damages is left solely to the discretion of the jury, Ibid. Section 2548, and such awards are not to be disturbed unless they are so excessive as to indicate that the jurors were actuated by passion or prejudice. Ibid. Section 2552. In *Hammersten v. Reilling,* 262 Minn. 200, 115 N.W. 2d 259, the same idea was expressed this way:

> "Determination of the amount of an award for such damages rests almost exclusively within the province of the jury and its action therein will not be disturbed on appeal, except where the amount awarded is so excessive as to be deemed unreasonable."

There is a split of authority on the question of whether punitive damages may be awarded against a corporation in the absence of proof that the management of the company participated in, authorized, or ratified the wrongful act, or whether the doctrine of *respondeat superior* applies to these damages as it does to compensatory damages. Minnesota follows the majority view in this country and allows punitive damages under the doctrine of *respondeat superior.* Ibid. Section 2553. This is of no great moment in this case, because the wrongful conduct was authorized or ratified by high echelon personnel. These prefatory remarks are made because in only two instances to this Court's knowledge have there been submissions of punitive damages to a jury in a products liability case, and our Supreme Court has not yet had an opportunity to review either one of these. Only in this case and in the case tried by the Honorable Daniel F. Foley,

Third Judicial District Judge in Freeborn County, in an action entitled *Oakhurst, Inc. v. Tasco, Inc., et al,* File No. 27015, has there been such a submission to a jury, and it is rather likely that the instant case will be reviewed first by the Supreme Court if there is an appeal because of the lengthy trial before Judge Foley and the necessity for transcribing approximately 20,000 pages of evidence.

B. FACTS SUPPORTING PUNITIVE DAMAGES AWARD.

This Court feels that some brief recitation of the facts might be useful insofar as they pertain to the punitive damages submission:

This accident occurred in 1969. By 1954, the defendant company was fully cognizant of the continuous problem with clothing fires resulting from cotton flannelette, and particularly those involving children. In 1956, defendant recognized that it was sitting on a powder keg because of the inflammability of its flannelette. By 1956, also, the defendant was fully aware that there were commercially feasible flame retardant processes on the market [Henry Franklyn's Lynrus FR-1 was an example] and was fully conscious of its liability if it continued to produce cotton flannelette without applying a flame retardant. The cotton flannelette was ultra-hazardous and was known so to be by the defendant at all times pertinent to this case. By 1960, defendant had been sued for apparel fires on a number of occasions, and a great majority of these lawsuits pertained to the burning of cotton flannelette. At no time during the period between 1954 and the date of this accident in 1969 did the de-

fendant attach any kind of warning to its product which would be passed on to the consumer to warn them of the ultra-hazardous nature of its product. These brief facts illustrate in a general way that Riegel was fully aware of the ultra-hazardous nature of its product; concealed that knowledge from the public; consciously and purposefully continued to manufacture the defective product by millions of yards; and hid behind the invalid CS 191-53 Flammability Test, fully aware that the test was invalid. They also illustrate clearly why the Court submitted the issue of punitive damages to the jury. There is no doubt in the Court's mind that Riegel knew that the production of cotton flannelette for children's and adult sleepwear, but particularly children's sleepwear, posed a grave danger to the lives of those customers using it for that purpose, and its failure to warn and its failure to incorporate a flame retardant which was available for fifteen years prior to this accident must be viewed as conduct so intentional, reckless, wanton, and wilful as to support a very substantial award for punitive damages.

C. PUNITIVE DAMAGES IN PRODUCTS LIABILITY CASES.

While this was one of the first cases in Minnesota in which the issue of punitive damages was submitted, and will be a case of first impression in our Minnesota Supreme Court, there is ample authority throughout the country for the submission of punitive damages in a products liability context. The leading cases on this subject are *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398, 29 A.L.R.3rd 988; *Gillham v.*

The Admiral Corporation, 523 F.2d 102; *Moore v. Jewel Tea Co.*, 116 Ill. App.2d 109, 253 N.E.2d 636, Aff'd, 46 Ill.2d 288, 263 N.E.2d 103; *Hoffman v. Sterling Drug, Inc.*, 485 F.2d 132; *Drake v. Wham-O Mfg. Co.*, 373 F.Supp. 608. Interestingly, the *Hoffman* case holds that it is reversible error not to submit the issue of punitive damages where there is a failure to warn, as there was in this case, and that failure endangers public health and safety.

In any discussion of the submission of punitive damages in products liability cases, one cannot overlook the very definitive article written by Professor David G. Owen in 1976 entitled "Punitive Damages in Products Liability Litigation," 74 Michigan Law Review 1257 [hereafter Owen], because he gives precise reasons why such a submission should be made in strict liability cases. There is no difficulty in the strict liability case of awarding compensatory damages to a person injured as a result of a defective product where the manufacturer has innocently marketed that product and has, in fact, exercised due care. The difficulty, as Owen points out, is at the other end of the "culpability scale," because there injury results not simply because the manufacturer markets its product, but because he does so in intentional or reckless disregard of consumer safety. He concludes, therefore, that punitive damages are probably appropriate and may be usefully awarded in the cases involving high culpability. An injured plaintiff would thus be entitled to damages not only for the wrongful conduct of the manufacturer in disseminating its defective product on the market, but for doing so intentionally, maliciously, or in reckless disregard of the rights of consumers.

In determining whether a manufacturer's conduct reflects a flagrant indifference to public safety, Owen points to five factors which may be considered:

> "1. The existence and magnitude in the product of a danger to the public;
>
> "2. The cost and feasibility of reducing the danger to an acceptable level;
>
> "3. The manufacturer's awareness of the danger, of the magnitude of the danger, and of the availability of a feasible remedy;
>
> "4. The nature and duration of, and the reasons for, the manufacturer's failure to act appropriately to discover or to reduce the danger; and
>
> "5. The extent to which the manufacturer purposefully created the danger."

Applying these standards to the case at hand, it is evident from the testimony that the defendant Riegel Textile was aware of the existence of approximately 155,000 burn cases annually at one point of time prior to the accident in question, and that a great bulk of these cases involved children in sleepwear; that Riegel was also fully aware of the ultra-hazardous nature of its flannelette; that at reasonable cost it was feasible to reduce the danger of ultra-hazardous sleepwear by applying a flame retardant which had been on the market for approximately fifteen years and defendant knew this; that it failed to act for many, many years, for reasons best known to itself, but which, in the view of the Court, related solely to the question of profitability, and failed to warn the public of the danger.

Owen points out that where manufacturers are 1) actually aware of a serious product hazard, and 2) refuse to adopt a feasible corrective measure, where it is well known that substantial risk of harm is presented if they do not, and 3) deliberately conceal the danger of their product to enhance its marketability, punitive damages are called for. That is precisely what happened in this case. Substantial evidence supports that conclusion, and it was for this reason that the issue of punitive damages was submitted to the jury. Moreover, this Court believes that punitive damages are the wave of the future in Minnesota, because, in its most recent session, the Legislature enacted Chapter 738, Laws of Minnesota, Section 4, which provides for the allowance of punitive damages in civil actions for all causes of action arising after April 15, 1978. That section will become M.S.A. 549.20, and would allow such damages against a corporation on a *respondeat superior* basis.

The defendant argues that because the Court charged that a wilful act was one which is done "intentionally, knowingly, and purposely, without justifiable excuse," that the jury could have found defendant Riegel liable for punitive damages simply because it manufactured and sold a standard product—namely, cotton flannelette—for use in children's sleepwear. This is a rather interesting way of understating the Court's charge and taking terms out of context. The fact is that the Court had charged the jury that they could not consider punitive damages until 1) they had determined that the defendant had committed wrongful conduct by disseminating the defective product onto the market and 2) that the wrongful conduct had caused the plaintiff's injury. Only after it had made these

findings could the jury then consider whether that wrongful conduct was intentionally, knowingly, and purposely done. The argument is somewhat sophistic and merits no further discussion. Defendant argues that because it complied with the Flammable Fabrics Act, in that its cotton flannelette passed the CS 191-53 test under that Act, the imposition of punitive damages is precluded, on the theory that the defendant has complied with the law. The difficulty with that argument is that it does not assess the validity of the test. It was proven almost conclusively at trial that this test did not and could not properly determine the flammability of fabrics such as cotton flannelette. Moreover, it was almost conclusively established, in addition, that defendant Riegel knew not only that the test was invalid but that it could not evaluate the flammability of its products. While it hid behind the skirts of the test in order to make its claim that it was not acting in reckless disregard of the rights of the public, its evidence in this regard was not very persuasive. Knowing full well at all times after the passage of the Flammable Fabrics Act that CS 191-53 was unreliable, the defendant cannot today say that punitive damages should not be allowed simply because its cotton flannelette passed an unreliable test. Riegel's argument that it has a right to act on the basis of the legislation that promulgated that test is a specious one, because such actions were not taken in good faith and must be viewed in the context of the knowledge that Riegel had that its cotton flannelette was extremely dangerous to the public because of its racing flammability.

D. EXCESSIVENESS OF PUNITIVE DAMAGES.

One of the claims of the defendant is that the punitive damage verdict was excessive, having been rendered by reason of passion and prejudice on the part of the jury. The Court has taken great pains to examine that claim, because, of course, the award was very substantial. Moreover, it was for this reason that separate briefs and separate oral argument were permitted. Since the jury is given full discretion in making its award of punitive damages under Minnesota law, a trial court cannot change that award unless it is excessive as a matter of law. Some courts have said that punitive damages must bear a reasonable relationship to the amount of compensatory damages awarded in order to guard against excesses. *Thompson v. Swank,* 317 Pa. 158, 176 A. 211 [1934], is one of those cases, and it was pointed out in *Thompson* that punitive damages must not be grossly disproportionate to the real damage inflicted. The real damage inflicted in this case produced a verdict of $750,000.00. Thus, the ratio between the punitive damages and the compensatory damages is 1 1/3 to 1.

In the largest single plaintiff's personal injury jury verdict rendered in a products liability case, in which $125,000,000.00 in punitive damages was awarded by a jury [*Richard Grimshaw v. Ford Motor Co.,* Superior Court, Santa Ana, California, February 6, 1978] the trial court reduced the punitive damage award to $3,500,000.00. The compensatory damage award in that case was $2,500.000.00, and thus the ratio between the punitive damages and compensatory damages, which the trial court felt was appropriate in *Grimshaw,* was 1 2/5 to 1.

In *Gillham v. The Admiral Corp.*, supra, the jury awarded compensatory damages of $125,000.00, punitive damages of $100,000.00, and attorneys' fees of $50,-000.00, which, in this Court's judgment, must be viewed as a part of the punitive damage award. [See Owen, page 1356, Footnote 478] In that case a motion for judgment n.o.v. was granted by the trial court, setting aside the award of punitive damages and attorneys' fees. However, the United States Court of Appeals for the Sixth Circuit reversed that judgment and restored the awards of punitive damages and attorneys' fees. If the attorneys' fees are viewed, as previously suggested, as a part of the punitive damages award, the ratio in that case would be 1 1/5 to 1. In *Toole v. Richardson Merrell, Inc.*, supra, the jury awarded the plaintiff $175,000.00 compensatory damages and $500,000.00 punitive damages. The trial court in that case remitted $250,000.00 of the punitive damage award, and this was upheld on appeal. The ratio in that case was slightly over 1 2/5 to 1.

The Court has chosen to recite these examples of awards of punitive damages and their relationship to the awards of compensatory damages because there are no standards to guide a court in determining whether an award of punitive damages is excessive, and that is particularly true in products liability cases, because punitive damages in those cases are in a state of current development. It is even more true in Minnesota where punitive damages have not been awarded until this case and the *Oakhurst* case. Even counsel, when asked by the Court at oral argument what criteria they thought the Court could employ in determining whether an award of dam-

ages was reasonable, could offer no suggestions. The Court does believe that looking at the ratio between punitive and compensatory damages, if the ratio is reasonable, is one method that may be used as a guideline in determining whether the punitive damage award is excessive.

In Minnesota, we also have some treble damage statutes that cover certain intentional torts. M.S.A. Section 548.05 and M.S.A. 561.04. These statutes might also serve as some kind of guideline, because they are, in effect, punitive damage statutes and allow a ratio of 2 to 1 between the punitive aspect and the general damage aspect.

In its memorandum on punitive damages, Riegel makes one or two other points which hardly bear discussion, because they have very little merit to them. The first is that the Court failed to advise the jury that they could consider the fact that the cotton flannelette conformed to CS 191-53 in considering the question of punitive damages. No request for such an instruction was made, of course; however, the Court did charge the jury that in considering whether the defendant acted in disregard of the plaintiff's rights wilfully and recklessly, it could consider, among other things, the following factors: the reasons for the manufacturer's failure to act appropriately to reduce the danger and *the extent to which the defendants are subject to Federal Safety Regulation.*

Riegel also asserts that the Court failed to instruct the jury on the question of the mother's duty, insofar as that may have been an intervening cause of the plaintiff's injuries. What that could possibly have to do with punitive damages is beyond this Court's comprehension, but, in any event, the Court did charge the jury on the ques-

tion of the mother's negligence, the jury returned a verdict in which they concluded there was an absence of any negligence on the mother's part, and thus the causation question became moot.

Finally counsel argues that there was misconduct on the part of plaintiffs' counsel during the trial and in his final argument. As previously pointed out, there were only two objections to the final argument, neither of which suggested any impropriety on the part of counsel. Nothing that plaintiffs' counsel did during the course of the trial, nor in his argument, could be classified as misconduct as that word is used in the case law in Minnesota. While the Court, as previously noted, was concerned with the personal animus that existed between counsel during the course of the trial, none of this rose to the level of misconduct and was really more lack of professional courtesy than anything else and technical failures to comply with the Rules of Civil Procedure.

This Court is mindful of the fact that a $1,000,000.00 punitive damage award is very substantial and generous. However, when that award is viewed in light of the magnitude of the danger to the public, which the defendant, a major corporation, created and persisted in extending, when viewed in light of the fact that it was economically feasible to reduce the danger to a fairly acceptable level for about fifteen years, when viewed in light of the defendant's knowledge that it was "sitting on a powder keg" all through this period, when viewed in light of the fact that the defendant presented no credible defense to this lawsuit and that its principal witnesses, Lund and Buck, gave completely implausible testimony to a jury,

and when viewed in light of the obvious wealth of a New York Stock Exchange listed corporation, it cannot be said that the award was excessive as a matter of law.

IX.

CONCLUSION

Nothing that occurred during the course of the trial and nothing that has been raised by defendant in its various memoranda suggests that there has been jury mistake, improper motive, bias, or caprice in this trial. No injustice has been done to the defendant. The injustice that was done to the plaintiff Lee Ann Gryc has been rectified by the jury verdict. A trial court is not free to set aside a jury verdict "whenever it is displeased or dissatisfied with the result of the jury's deliberations." And certainly would not be in a position to do so when it is neither displeased nor dissatisfied. *Koenig v. Ludowese,* 308 Minn. 380, 243 N.W.2d 29.

What was said in *Koenig* by Chief Justice Sheran is particularly appropriate here and bears repeating:

> "As early as 1882, in *Rheiner v. Stillwater St. Ry. & T. Co.*, 29 Minn. 147, 150, 12 N.W. 499, 451, Mr. Justice Mitchell noted that a trial court 'ought to exercise not merely a cautious, but a strict and sure, judgment before setting aside a verdict' rendered by a jury, for 'the general rule is that a verdict will not be set aside unless clearly and palpably against the evidence.' The reasons supporting this view of Mr. Justice Mitchell apply even more strongly today. The likelihood of unjust jury verdicts resulting from poor preparation or surprise has been

reduced, if not eliminated, by the wide-ranging modes of discovery permitted under the Rules of Civil Procedure first adopted in 1951. *Jurors,* when selected in compliance with the relevant statutes and special acts, *are generally equipped by experience and education to assess evidence and decide the questions referred to them for decision. These factors should enhance the reliability of jury verdicts and increase judicial confidence in the soundness of their decisions.*

"Finally, our courts, already strained to meet the burdens of increasing litigation, should not complicate the allocation of judicial manpower and resources by granting motions for new trial pursuant to Rule 59.01[7], Rules of Civil Procedure, in cases where the preponderance of the evidence fails to suggest clearly jury mistake, improper motive, bias, or caprice.

"In summary, trial judges should exercise the authority granted in Rule 59.01 [7] with reluctance and caution, particularly in cases where there are no expressed and articulable reasons, based upon demonstrable circumstances or events, which support a conclusion that injustice has been done . . ." [Emphasis supplied]

As previously pointed out, no injustice has been done here, except the one to the plaintiff Lee Ann Gryc, and that has been rectified by the jury verdict. Accordingly, the jury verdict must stand.

/s/ H. S., Judge

REQUESTED JURY INSTRUCTION #3

You are instructed that a fabric which passes the test promulgated by the Federal Flammable Fabrics Act and in force at the time of the sale of this cloth, CS191-53, is normally flammable.

Federal Flammable Fabrics Act, 15 U.S.C. Sec. 1191, et seq.,

Bellotte v. Zayre Corp., 531 F. 2d 1100, 1103 (1976).

REQUESTED JURY INSTRUCTION #4

You are instructed that evidence that the fabric sold by defendant Riegel Textiles passed the Federal Flammable Fabrics Act test, CS191-53, is evidence that the fabric was not unreasonably dangerous at the time of its sale.

Federal Flammable Fabrics Act, 15 U.S.C. Sec. 1191, et seq.,

Bellotte v. Zayre Corp., 531 F. 2d 1100, 1103 (1976).

TRANSCRIPT OF MOTION FOR DIRECTED VERDICT

[1705] Mr. Holtze: If that is the case, then, the defendant moves the Court for a directed verdict on the ground that the plaintiffs have failed to maintain a burden of proof in proving that the product involved herein—that is, 100 percent cotton flannelette—was defective in manufacture or design, in that it is not unreasonably dangerous or unreasonably flammable, has passed the CS 191-53 and admitted so by the plaintiffs that it passed this test and that it burns in a normal manner.

The Court: That motion will be denied.

* * *

[1708] Mr. Henshaw: Well, make that two motions. Defendant moves the Court for a directed verdict on the question of punitive damages, the reason being that there has been no showing of the necessary wilfulness, wantonness, or maliciousness by the plaintiffs, and as I understand Minnesota law, something on the order of an [1709] intentional tort is necessary to support an award of punitive damages.

I think the evidence shows—as long as we are summarizing here—that defendant was making all efforts to test and develop a flame retardant treatment for cotton flannelette that would be commercially successful and that they were not in a position to do the basic chemical research themselves. The evidence further shows that that basic chemical research was being conducted on a large scale in a number of places, the large chemical companies, the U.S. government in its Southern Regional Research Lab, and, as I am sure plaintiffs will point out, Mr. Franklyn's factory.

I think that the evidence submitted by the defendant shows that the article sold was normally flammable, was no different than it had been for however long cotton flannelette had been made in regard to its flammability characteristics, and that basically no actions supporting an award of punitive damages have been proven by the plaintiffs.

The Court: That motion will be denied.

* * *

A-77

code of federal regulations

16

Commercial Practices

PART 1000 TO END

Revised as of January 1, 1980

CONTAINING
A CODIFICATION OF DOCUMENTS OF GENERAL APPLICABILITY AND FUTURE EFFECT

AS OF JANUARY 1, 1980

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the act that the act, the Government, or any branch thereof, guarantees, in any manner that such product, fabric, or related material conforms to a flammability standard in effect under the act.

PART 1609—TEXT OF THE FLAMMABLE FABRICS ACT OF 1953, AS AMENDED IN 1954, PRIOR TO 1967 AMENDMENT AND REVISION

§ 1609.1 Text of the Flammable Fabrics Act of 1953, as amended in 1954.

The following is the text of the Flammable Fabrics Act of 1953, ch. 164, 67 Stat. 111, as amended, ch. 833, 68 Stat. 770 (1954):

AN ACT

To prohibit the introduction or movement in interstate commerce of articles of wearing apparel and fabrics which are so highly flammable as to be dangerous when worn by individuals, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Flammable Fabrics Act."

DEFINITIONS

SEC. 2. As used in this Act—

(a) The term "person" means an individual, partnership, corporation, association, or any other form of business enterprise.

(b) The term "commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

(c) The term "Territory" includes the insular possessions of the United States and also any Territory of the United States.

(d) The term "article of wearing apparel" means any costume or article of clothing worn or intended to be worn by individuals except hats, gloves, and footwear: Provided, however, That such hats do not constitute or form part of a covering for the neck, face, or shoulders when worn by individuals: Provided further, That such gloves are not more than fourteen inches in length and are not affixed to or do not form an integral part of another garment: And provided further, That such footwear does not consist of hosiery in whole or in part and is not affixed to or does not form an integral part of another garment.

(e) The term "fabric" means any material (other than fiber, filament, or yarn) woven, knitted, felted, or otherwise produced from or in combination with any natural or synthetic fiber, film, or substitute therefor which is intended or sold for use in wearing apparel except that interlining fabrics when intended or sold for use in wearing apparel shall not be subject to this Act.

(f) The term "interlining" means any fabric which is intended for incorporation into an article of wearing apparel as a layer between an outer shell and an inner lining.

(g) The term "Commission" means the Federal Trade Commission.

(h) The term "Federal Trade Commission Act" means the Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, as amended.

PROHIBITED TRANSACTIONS

SEC. 3. (a) The manufacture for sale, the sale, or the offering for sale, in commerce, or the importation into the United States, or the introduction, delivery for introduction, transportation or causing to be transported in commerce or for the purpose of sale or delivery after sale in commerce, of any article of wearing apparel which, under the provisions of section 4 of this Act is so highly flammable as to be dangerous when worn by individuals, shall be unlawful and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.

(b) The sale or the offering for sale, in commerce, or the importation into the United States, or the introduction, delivery for introduction, transportation or causing to be transported in commerce or for the purpose of sale or delivery after sale in commerce, of any fabric which under the provisions of section 4 of this Act is so highly flammable as to be dangerous when worn by individuals, shall be unlawful and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.

(c) The manufacture for sale, the sale or the offering for sale, of any article of wearing apparel made of fabric which under section 4 is so highly flammable as to be dangerous when worn by individuals and which has been shipped or received in commerce shall be unlawful and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act

STANDARD OF FLAMMABILITY

SEC. 4. (a) Any fabric or article of wearing apparel shall be deemed so highly flammable within the meaning of section 3 of this Act as to be dangerous when worn by individuals if such fabrics or any uncovered or exposed part of such article of wearing apparel exhibits rapid and intense burning when tested under the conditions and in the manner prescribed in the Commercial Standard promulgated by the Secretary of Commerce effective January 30, 1953, and identified as "Flammability of Clothing Textiles, Commercial Standard 191-53," or exhibits a rate of burning in excess of that specified in paragraph 3.11 of the Commercial Standard promulgated by the Secretary of Commerce effective May 22, 1953, and identified as "General Purpose Vinyl Plastic Film, Commercial Standard 192-53." For the purposes of this Act, such Commercial Standard 191-53 shall apply with respect to the hats, gloves, and footwear covered by section 2(d) of this Act, notwithstanding any exception contained in such Commercial Standard with respect to hats, gloves, and footwear.

(b) If at any time the Secretary of Commerce finds that the Commercial Standards referred to in subsection (a) of this section are inadequate for the protection of the public interest, he shall submit to the Congress a report setting forth his findings together with such proposals for legislation as he deems appropriate.

(c) Notwithstanding the provisions of paragraph 3.1 Commercial Standard 191-53, textiles free from nap, pile, tufting, flock or other type of raised fiber surface when tested as described in said standard shall be classified as class 1, normal flammability, when the time of flame spread is three and one-half seconds or more, and as class 3, rapid and intense burning when the time of flame spread is less than three and one-half seconds. [Approved August 23, 1954.]

ADMINISTRATION AND ENFORCEMENT

SEC. 5. (a) Except as otherwise specifically provided herein, sections 3, 5, 6, and 8(b) of this Act shall be enforced by the Commission under rules, regulations and procedures provided for in the Federal Trade Commission Act.

(b) The Commission is authorized and directed to prevent any person from violating the provisions of Section 3 of this Act in the same manner, by the same means and with the same jurisdiction, powers and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this Act; and any such person violating any provision of section 3 of this Act shall be subject to the penalties and entitled to the privileges and immunities provided in said Federal Trade Commission Act as though the applicable terms and provisions of the said Federal Trade Commission Act were incorporated into and made a part of this Act.

(c) The Commission is authorized and directed to prescribe such rules and regulations as may be necessary and proper for purposes of administration and enforcement of this Act.

(d) The Commission is authorized to—

(1) cause inspections, analyses, tests, and examinations to be made of any article of wearing apparel or fabric which it has reason to believe falls within the prohibitions of this Act; and

(2) cooperate on matters related to the purposes of this Act with any department or agency of the Government; with any State, Territory, or possession or with the District of Columbia; or with any department, agency, or political subdivision thereof; or with any person.

INJUNCTION AND CONDEMNATION PROCEEDINGS

SEC. 6. (a) Whenever the Commission has reason to believe that any person is violating or is about to violate section 3 of this Act, and that it would be in the public interest to enjoin such violation until complaint under the Federal Trade Commission Act is issued and dismissed by the Commission or until order to cease and desist made thereon by the Commission has become final within the meaning of the Federal Trade Commission Act or is set aside by the court on review, the Commission may bring suit in the district court of the United States or in the United States court of any Territory for the district or Territory in which such person resides or transacts business, to enjoin such violation and upon proper showing a temporary injunction or restraining order shall be granted without bond.

(b) Whenever the Commission has reason to believe that any article of wearing apparel has been manufactured or introduced into commerce or any fabric has been introduced in commerce in violation of section 3 of this Act, it may institute proceedings by process of libel for the seizure and confiscation of such article of wearing apparel or fabric in any district court of the United States within the jurisdiction of which such article of wearing apparel or fabric is found. Proceedings in cases instituted under the authority of this section shall conform as nearly as may be to proceedings in rem in admiralty, except that on demand of either party and in the discretion of the court, any issue of fact shall be tried by jury. Whenever such proceedings involving identical articles of wearing apparel or fabrics are pending in two or more jurisdictions, they may be consolidated for trial by order of any such court upon application reasonably made by any party in interest upon notice to all other parties in interest. Any court

granting an order of consolidation shall cause prompt notification thereof to be given to other courts having jurisdiction in the cases covered thereby and the clerks of such other courts shall transmit all pertinent records and papers to the court designated for the trial of such consolidated proceedings.

(c) In any such action the court upon application seasonably made before trial shall by order allow any party in interest, his attorney or agent, to obtain a representative sample of the article of wearing apparel or fabric seized.

(d) If such articles of wearing apparel or fabrics are condemned by the court they shall be disposed of by destruction, by delivery to the owner or claimant thereof upon payment of court costs and fees and storage and other proper expenses and upon execution of good and sufficient bond to the effect that such articles of wearing apparel or fabrics will not be disposed of for wearing apparel purposes until properly and adequately treated or processed so as to render them lawful for introduction into commerce, or by sale upon execution of good and sufficient bond to the effect that such articles of wearing apparel or fabrics will not be disposed of for wearing apparel purposes until properly and adequately treated or processed so as to render them lawful for introduction into commerce. If such products are disposed of by sale the proceeds, less costs and charges, shall be paid into the Treasury of the United States.

PENALTIES

SEC. 7. Any person who willfully violates section 3 or 8(b) of this Act shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than $5,000 or be imprisoned not more than one year or both in the discretion of the court: Provided, That nothing herein shall limit other provisions of this Act.

GUARANTY

SEC. 8. (a) No person shall be subject to prosecution under section 7 of this Act for a violation of section 3 of this Act if such person (1) establishes a guaranty received in good faith signed by and containing the name and address of the person by whom the wearing apparel or fabric guaranteed was manufactured or from whom it was received, to the effect that reasonable and representative tests made under the procedures provided in section 4 of this Act show that the fabric covered by the guaranty, or used in the wearing apparel covered by the guaranty, is not, under the provisions of section 4 of this Act, so highly flammable as to be dangerous when worn by individuals, and (2) has not, by further processing, affected the flammability of the fabric or wearing apparel covered by the guaranty which he received. Such guaranty shall be either (1) a separate guaranty specifically designating the wearing apparel or fabric guaranteed, in which case it may be on the invoice or other paper relating to such wearing apparel or fabric; or (2) a continuing guaranty filed with the Commission applicable to any wearing apparel or fabric handled by a guarantor, in such form as the Commission by rules or regulations may prescribe.

(b) It shall be unlawful for any person to furnish, with respect to any wearing apparel or fabric, a false guaranty (except a person relying upon a guaranty to the same effect received in good faith signed by and containing the name and address of the person by whom the wearing apparel or fabric guaranteed was manufactured or from whom it was received) with reason to believe the wearing apparel or fabric falsely guaranteed may be introduced, sold, or transported in commerce, and any person who violates the provisions of this subsection is guilty of an unfair method of competition, and an unfair or deceptive act or practice, in commerce within the meaning of the Federal Trade Commission Act.

SHIPMENTS FROM FOREIGN COUNTRIES

SEC. 9. Any person who has exported or who has attempted to export from any foreign country into the United States any wearing apparel or fabric which, under the provisions of section 4, is so highly flammable as to be dangerous when worn by individuals may thenceforth be prohibited by the Commission from participating in the exportation from any foreign country into the United States of any wearing apparel or fabric except upon filing bond with the Secretary of the Treasury in a sum double the value of said products and any duty thereon, conditioned upon compliance with the provisions of this Act.

INTERPRETATION AND SEPARABILITY

SEC. 10. The provisions of this Act shall be held to be in addition to, and not in substitution for or limitation of, the provisions of any other law. If any provision of this Act or the application thereof to any person or circumstances is held invalid the remainder of the Act and the application of such provisions to any other person or circumstances shall not be affected thereby.

EXCLUSIONS

SEC. 11. The provisions of this Act shall not apply (a) to any common carrier, contract carrier, or freight forwarder with respect to an article of wearing apparel or fabric shipped or delivered for shipment into commerce in the ordinary course of its business; or (b) to any converter, processor, or finisher in performing a contract or com-

mission service for the account of a person subject to the provisions of this Act: Provided, That said converter, processor, or finisher does not cause any article of wearing apparel or fabric to become subject to this Act contrary to the terms of the contract or commission service; or (c) to any article of wearing apparel or fabric shipped or delivered for shipment into commerce for the purpose of finishing or processing to render such article or fabric not so highly flammable, under the provisions of section 4 of this Act, as to be dangerous when worn by individuals.

EFFECTIVE DATE

SEC. 12. This Act shall take effect one year after the date of its passage.

AUTHORIZATION OF NECESSARY APPROPRIATIONS

SEC. 13. There is hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

[40 FR 59889, Dec. 30, 1975]

PART 1610—STANDARD FOR THE FLAMMABILITY OF CLOTHING TEXTILES

Subpart A—The Standard

Sec.
1610.1 Purpose.
1610.2 Scope.
1610.3 Requirements.
1610.4 Methods of test.
1610.5 Notes.

Subpart B—Rules and Regulations

1610.31 Terms defined.
1610.32 General requirements.
1610.33 Test procedures for textile fabrics and films.
1610.34 Only uncovered or exposed parts of wearing apparel to be tested.
1610.35 Testing certain classes of fabrics.
1610.36 Application of act to particular types of products.
1610.37 Reasonable and representative test under section 8 of the act.
1610.38 Maintenance of records by those furnishing guaranties.
1610.39 Shipments under 11(c) of the act.

Subpart C—Interpretations and Policies

1610.61 Clarification of flammability standard for clothing textiles (CS 191-53).

SOURCE: 40 FR 59891, Dec. 30, 1975, unless otherwise noted.

CODIFICATION NOTE: Part 1610 is a codification of the previously unpublished standard for flammability of clothing textiles, Commercial Standard 191-53, issued by the Department of Commerce, effective on January 30, 1953. This flammability standard became mandatory through section 4(a) of the Flammable Fabrics Act, as amended in 1954, and remains in effect due to the savings clause (section 11) of Pub. L. 90-189. 16 CFR Part 1609 contains the text of the Flammable Fabrics Act of 1953, as amended in 1954.

Subpart A—The Standard

AUTHORITY: Sec. 5, Pub. L. 83-88, 67 Stat. 112, as amended, 68 Stat. 770; 15 U.S.C. 1193; sec. 11, Pub. L. 90-189, 81 Stat. 568.

NOTE: All fabrics of natural or regenerated cellulose as well as certain types of finished and unfinished fabrics made from other natural or synthetic fibers, are combustible. Some combustible fabrics, when used for clothing, are potentially dangerous to the wearer because of the speed and intensity of flame with which those fabrics burn and their ease of ignition, and because of the design of the garment. Two of these factors, the ease of ignition and the speed of flame spread, can be measured with the instrument described herein.

It is suggested that measurement of these two factors, together with visual observation of flame intensity will permit the separation of various fabrics into three classes of flammability, thus assisting in the judgment of fabric suitability for clothing.

§ 1610.1 Purpose.

The purpose of this standard is to reduce danger of injury and loss of life by providing, on a national basis, standard methods of testing and rating the flammability of textiles and textile products for clothing use, thereby discouraging the use of any dangerously flammable clothing textiles.

§ 1610.2 Scope.

(a) The standard provides[1] methods of testing the flammability of clothing and textiles intended to be used for clothing,[2] establishes three classes

[1] Hereinafter, "clothing and textiles intended to be used for clothing" shall be referred to as "textiles."

[2] All the numbered footnotes are from the original printing by the Department of Commerce. All the lettered footnotes are new.

[3] Refer to sections 2 and 4 of the Flammable Fabrics Act of 1953, as amended in 1954, set out at 16 CFR Part 1609, for the scope of the Standard.

Footnotes continued on next page.

of flammability, sets forth the requirements which textiles shall meet to be so classified, and warns against the use of those textiles which have burning characteristics unsuitable for clothing.

(b) *Specific exceptions.*—This standard shall not apply to—

(1) Hats, gloves, and footwear[c]

(2) Interlining fabrics[2]

§ 1610.3 Requirements.

(a)(1) *Normal flammability, Class 1.* This class shall include textiles which meet the minimum requirements set forth in paragraph (a)(1)(i) or paragraph (a)(1)(ii) of this section. Textiles meeting these requirements are generally accepted by the trade as having no unusual burning characteristics.

(i) *Textile without nap, pile, tufting, flock, or other type of raised-fiber surface.* Such textiles in their original state and/or after being dry-cleaned and washed as described in § 1610.4(d) and § 1610.4(e), when tested as described in § 1610.4 shall be classified as Class 1, normal flammability, when the time of flame spread is 4 seconds[c] or more.

(ii) *Napped, pile, tufted, flocked, or other textiles having a raised-fiber surface.* Such textiles in their original state and/or after being dry-cleaned and washed as described in § 1610.4(d) and § 1610.4(e), when tested as described in § 1610.4, shall be classified as Class 1, normal flammability, when the time of flame spread is more than 7 seconds, or when they burn with a rapid surface flash (from 0 to 7 seconds), provided the intensity of the flame is so low as not to ignite or fuse the base fabric.

(2) *Intermediate flammability, Class 2.* This class shall include textiles which meet the minimum requirements set forth in paragraph (a)(2)(i) of this section. Textiles meeting these requirements are recognized by the trade as having flammability characteristics between normal and rapid and intense burning.

(i) *Napped, pile, tufted, flocked, or other textiles having a raised-fiber surface.* Such textiles in their original state and/or after being dry-cleaned and washed as described in § 1610.4(d) and § 1610.4(e), when tested as described in § 1610.4, shall be classified as Class 2, intermediate flammability, when the time of flame spread is from 4 to 7 seconds, both inclusive, and the base fabric ignites or fuses.

(3) *Rapid and intense burning, Class 3.* This class shall include textiles which have burning characteristics as described in paragraphs (a)(3)(i) and (a)(3)(ii) of this section. Such textiles are considered dangerously flammable and recognized by the trade as being unsuitable for clothing because of their rapid and intense burning.

(i) *Textiles free from nap, pile, tufting, flock, or other type of raised-fiber surface.* Such textiles in their original state and/or after being dry-cleaned and washed as described in § 1610.4(d) and § 1610.4(e), when tested as described in § 1610.4, shall be classified as Class 3, rapid and intense burning, when the time of flame spread is less than 4 seconds.[c]

(ii) *Napped, pile, tufted, flocked, or other textiles having a raised-fiber surface.* Such textiles in their original state and/or after being dry-cleaned and washed as described in § 1610.4(d) and § 1610.4(e) when tested as described in § 1610.4 shall be classified as Class 3, rapid and intense burning, when the time of flame spread is less than 4 seconds and when the intensity of flame is such as to ignite or fuse the base fabric.

Footnotes continued from previous page

[c] Refer to sections 2(d) and 4 of the Flammable Fabrics Act of 1953, as amended in 1954, set out at 16 CFR Part 1609 for exceptions to this exception.

[2] Interlining fabrics are not considered dangerously flammable when used as interlinings. When used for other purposes they should be tested and rated the same as any other fabrics.

[4] On August 23, 1954, the Flammable Fabrics Act was amended, changing the test for the time of flame spread for plain-surfaced fabrics, provided in paragraphs 3.1.1.1 (now § 1610.3(a)(1)(i)) and 3.1.3.1 (now § 1610(a)(3)(i)), by reducing the burning time from 4 to 3½ seconds. For the purpose of the administration of that act, therefore, the 3½ second burning time for plain-surface fabrics is applicable.

[c] See footnote d.

§ 1610.4 Methods of test.

(a)(1) *Number and size of specimens required.* Five specimens, each measuring 2 by 6 inches, are required for each test.

(2) For textiles without a raised-fiber surface the long dimension shall be that in which they burn most rapidly, and the more rapidly burning surface shall be tested. To establish the long dimension and the surface, preliminary tests are made as described in paragraph (g) of this section, with specimens cut in different directions.

(3) For textiles having a raised-fiber surface, the direction of the lay of the surface fibers shall be parallel with the long dimension of the specimens. For this type of textiles with varying depths of pile, tufting, etc., the specimens are taken from that part and tested on that surface which has the fastest rate of burning.

(4) If the specimens in the preliminary test, when tested as described in paragraph (g) of this section, do not ignite or are very slow burning, or should have a fire-retarding finish, a swatch large enough to provide the specimens required for the test, with allowance for shrinkage in dry cleaning and washing, is subjected to the dry cleaning and washing procedures described in paragraphs (d) and (e) of this section. The specimens for the flammability test are then taken from it.

(5) The specimens required for testing, each 2 by 6 inches, are marked out on the back (or under side) of each sample with the long dimension in the direction in which burning is most rapid, as established in the preliminary trials. The end of the specimen toward which and on the face of which burning is most rapid is identified by attaching a staple to it. The specimens are then cut out.

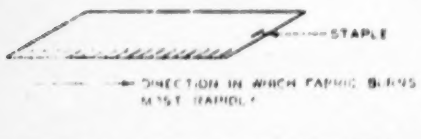

FIGURE 1.—Specimen showing staple

(b) *Flammability tester.*[1] The flammability tester consists of a draft-proof ventilated chamber enclosing a standardized ignition medium, sample rack, and automatic timing device.

(1) *Draft-proof chamber with vented top (A, fig. 2).* This metal chamber prevents air circulation around the specimen rack and flame, but permits free ventilation for rapid oxidation. The chamber is 14½ inches wide, 8½ inches deep, and 14 inches high. There are 12 half-inch holes equidistant along the rear of the top closure. A ventilating strip is provided at the base of the sliding glass door in the front of the apparatus.

(2) *Specimen rack (B, fig. 2).* The specimen rack provides supports for the frames in which the specimens are mounted. The angle of inclination is 45°. Two guide pins projecting downward from the center of the base of the rack travel in slots provided in the floor of the chamber so that adjustment can be made for the thickness of the specimen in relation to the flame front. A stop is provided in the base of the chamber to assist in adjusting the position of the rack.

(3) *Specimen holder (C, fig. 2).* The specimen holder consists of two ¼-inch matched metal plates with clamps mounted along the sides, between which the specimen is fixed. The plates are slotted and loosely pinned for alignment. The two plates of the holder cover all but 1¼ inches of the width of the specimen for its full length. The specimen holder is supported in the draft-proof chamber on the rack at an angle of 45°. Five specimen holders are provided.

(4) *Indicating finger (D, fig. 2).* The forepart of this finger touches the specimen when the rack is adjusted. By means of this finger the thickness of the specimen is compensated for in the throw of the gas nozzle.

[1] This apparatus is manufactured by the United States Testing Co., 1415 Park Avenue, Hoboken, N.J. Blueprints of working plans for the manufacture of the apparatus are available, at a nominal charge, from the above-named company.

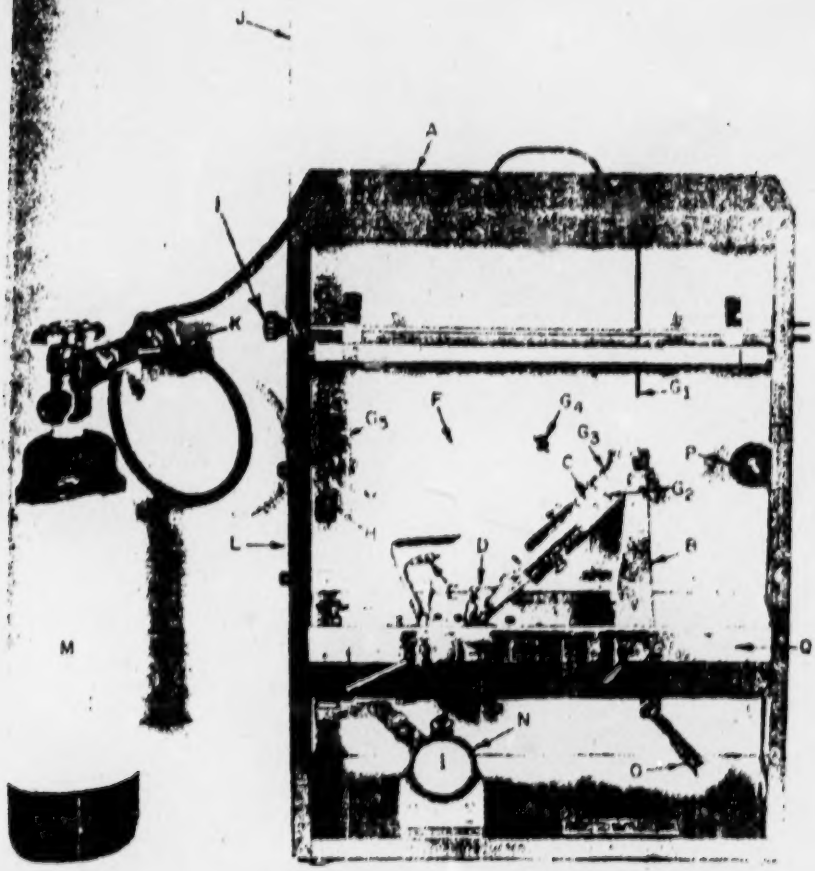

FIGURE 2.- Flammability tester [1]

[1] This is a new photograph of the flammability tester which reflects the clarification of the stop cord position, set out at § 1610.61(c)(1). References in the text have been changed to correspond with the new photograph, and therefore the letters in the new figure 2 do not entirely correspond to the old figure 2, which appeared in the earlier printings. The letter changes are (new:old) E:F, F:G G_1:H, H:I, I:J, J:K, K:L, L:V, G_2 Q:R.

60-041 O-80---23

(5) *Control knobs (not shown).* There are two of these knobs which hold the rack in test position. The knobs can be reached under the stage of the cabinet and permit forward and backward movements of the rack when loosened.

(6) *Ignition medium (E, fig. 2).* The ignition medium consists of a spring-motor-driven gas-jet formed around a 26-gage hypodermic needle. A trigger located in the front of the apparatus serves to wind the spring-motor when the machine is placed in operation. The gas jet is protected by a copper shield.

(7) *Stop cord (F, fig. 2).* This cord, stretched from the spool (*P*, fig. 2) through suitable thread guides provided on the specimen frame and chamber walls, permits the lacing of the cord in the proper position exactly 5 inches from the point where the center of the ignition flame impinges on the test specimen. The stop cord consists of a No. 50 mercerized sewing thread and measures the rise and spread of the flame from the test specimen.

(8) *Pulley or eye (G_5, fig. 2).* The pulley or eye is the support and guide for the stop cord.[3]

(9) *Stop weight (H, fig. 2).* The weight, attached by means of a clip to the stop cord, in dropping actuates the stop motion.

(10) *Slide door control (I, fig. 2).* This knob moves the catch mechanism used to hold the sliding door in an open position for insertion of test specimen racks.

(11) *Slide door (J, fig. 2).* A glass door in its normal position slides in the grooves at the front of the cabinet.

(12) *Fuel-control valve (K, fig. 2).* This valve consists of a sensitive control device for regulating the fuel supply at the tank. The valve ends in a ¼-inch male connection for attachment to the standard butane tank of 2 pounds capacity.

(13) *Flow meter. (L, fig. 2).* A flow meter is used to bring the fuel supply to test level by means of the control valve. The flow meter consists of a U-shaped glass tube cut into the gas line in a manner to register the gas pressure delivered to the microburner. Attached to the case wall behind the flow meter is a movable metal plate with two parallel horizontal lines properly spaced for the desired flame length. When the pressure is off, the plate is so regulated that the liquid level in both sides of the U-shaped tube meets the lower line. When the test is made the pressure is so adjusted that the higher liquid level in the U-shaped tube meets the upper line.

(14) *Butane, c.p., container[4] (M, fig. 2).* This fuel supply is a No. 4 cylinder of c.p. butane.

(15) *Stopwatch and timing mechanism (N, fig. 2).* This watch, by means of special attachments, is actuated to a start by connection with the gas jet (E, fig. 2). A driving mechanism on rear of cabinet (*S*, fig. 2) moves the gas jet to its most forward position and automatically starts the timing at the moment of flame impact. The falling weight (H, fig. 2), when caused to move by severance of cord (F, fig. 2), stops the watch. Timing is read directly.

(16) *Starting lever (O, fig. 2).* This lever is operated from left to right in one stroke and is released to operate the gas jet.

(17) *Cord supply (P, fig. 2).* This supply, consisting of a spool of No. 50 mercerized cotton sewing thread, is fastened to the side of the chamber and can be withdrawn by releasing the thumbscrew holding same in position.

(18) *Cord loop (G_6, fig. 2).* At a point behind the stop cord (F, fig. 2), on the rear panel, there is installed another loop to draw the cord away from directly over the flame.

(19) *Draft ventilator strip (Q, fig. 2).* A draft ventilator strip is placed across the front opening, sealing the space between the sliding door when in lowered position and the base on which the grid rack is attached.

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[3] Other guides are specifically identified as the skyhook (G_1), the L-shaped guides (G_2, G_3) and a pigtail guide (G_4). See § 1610.61(c)(1) for a clarification of the stop cord position.

[4] Butane, c.p. No. 4 cylinders containing 2 pounds of butane may be obtained from, among others, the Matheson Co., Inc., East Rutherford, N.J.

(c) *Brushing device*[5]

(1) This device consists of a baseboard over which a smaller carriage is drawn. This carriage runs on parallel tracks attached to the edges of the upper surface of the baseboard. The brush is hinged with pin hinges at the rear edge of the baseboard and rests on the carriage vertically with a pressure of 150 grams.

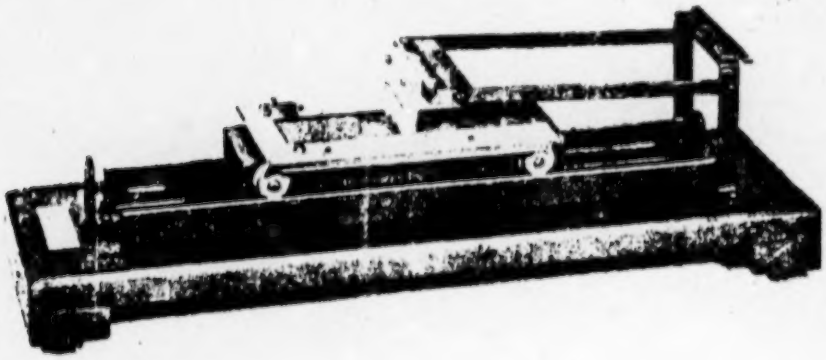

FIGURE 3.—Brushing device.[1]

(2) The brush consists of two rows of stiff nylon bristles mounted with the tufts in a staggered position. The bristles are 0.016 inch in diameter and 0.75 inch in length. There are 20 bristles per tuft and 4 tufts per inch. A clamp is attached to the forward edge of the movable carriage to permit holding the specimen on the carriage during the brushing operation.

(3) After the specimen has been put in place on the carriage and fastened by means of the clamp, the brush is raised, the carriage pushed to the rear, and the brush lowered to the face of the specimen. The carriage is then drawn forward by hand at a uniform rate.

(d) *Dry cleaning.* A swatch from each sample, as mentioned in paragraph (a)(4) of this section, shall be subjected to the following dry-cleaning procedure.

(1) *Apparatus.* The apparatus is a cylinder, preferably of metal, approximately 13 inches high and about 8¾ inches in diameter (capacity 3 gallons). The cylinder is mounted in a vertical position on an axis which is inclined 50° to the axis of the cylinder, and is rotated about this axis at a speed of 45 to 50 revolutions per minute.[1]

(2) *Cleaning procedure.* The apparatus is filled approximately one-third with perchlorethylene to which is added 270 ml of dry-cleaning soap.[6]

[5] This device is manufactured by the United States Testing Co., 1415 Park Avenue, Hoboken, N.J.

[6] See § 1610.61(c)(2) for a clarification of the brushing technique for fabric with raised-fiber surfaces.

[1] See footnote h; this picture is a reproduction of the figure published in the original standard, and does not truly represent the Commission's interpretation of the proper position of the specimen during the brushing procedure (§ 1610.61(c)(2)). Specifically, the specimen in the picture appears to be below the level of the upper half of the specimen holder while the clarification requires the specimen to be placed above this level. Also, § 1610.61(c)(1) allows for the use of L-shaped guides.

[6] The soap shall be made by dissolving 56 grams of caustic potash (KOH) in 100 ml of water. The potassium hydroxide solution shall be poured slowly, with constant stir-

Footnotes continued on next page

The swatches and sufficient suitable worsted cloth,[7] in pieces of approximately 12 by 12 inches, to make a total dry load of 1 pound are placed in the apparatus. It is operated for 25 minutes. The solution is poured out, the apparatus refilled to approximately one-third with fresh perchlorethylene without soap, and the apparatus is operated for an additional 5 minutes. This last operation is repeated three times. The swatches are then removed and the excess solvent removed from the swatches by any convenient means, such as rolling them between two layers of turkish toweling or between two layers of absorbent paper. They are then permitted to dry at room temperature.

(e) *Washing procedure.* The swatches, after being subjected to the dry-cleaning procedure (paragraph (d) of this section), shall then be immersed and worked gently for 5 minutes in a bath of soft water in which 0.5-percent neutral chip soap has been dissolved. The volume of the bath shall be 30 times the weight of the swatches and the temperature shall be between 95° and 100° F. The swatches shall then be rinsed twice in water at 80° F., extracted, and dried. The individual specimens, each 2 by 6 inches, are then cut out as described in paragraph (a)(5) of this section and tested as described in paragraphs (f) and (g) of this section.

(f) *Brushing and drying specimens.* Each specimen having a raised-fiber surface, in its original condition or after dry cleaning and washing, is placed on the brushing device carriage (paragraph (c) of this section) and drawn under the brush once against the lay of the raised-fiber surface (see fig. 4). Other specimens do not require brushing. All specimens are clamped individually in the specimen holders of the flammability tester (paragraph (b)(3) of this section), with the staple on top and the stapled end at the closed end of the holder. They are then dried in a horizontal position in an oven for 30 minutes at 221° F (105° C), removed from the oven, and placed over anhydrous calcium chloride in a desiccator until cool, but for not less than 15 minutes.

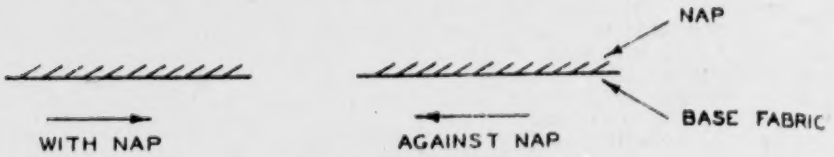

FIGURE 4.—Lay of nap.

(g) *Procedure for testing flammability.* (1) Adjust the position of the rack of the flammability tester (paragraph (b)(2) of this section) with a holder and trial specimen (not a prepared specimen) in position, so that the tip of the indicator finger touches the face of the specimen.

(2) Open the control valve in the fuel supply. Allow approximately 5 minutes for the air to be drawn from the fuel line, ignite the gas and adjust the flame to a length of ⅝ inch, measured from its tip to the opening in the gas nozzle.

(3) Remove the mounted specimen from the desiccator and place it in a position on the rack in the chamber of the apparatus.

(4) See that the stop cord (No. 50 cotton sewing thread) is strung through the guides in the upper plate of the specimen holder across the top of the specimen, and through the guides at the rear of the chamber over the guide ring, and that the weight is hooked in place close to and just below the guide ring. Set the stop watch at zero. Close the door of the apparatus.

Footnotes continued from previous page

ring, into a mixture of 340 grams of oleic acid, 400 ml of Stoddard solvent (Commercial Standard CS3-40 grade), and 100 ml of tertiary butyl alcohol or an equal quantity of butyl cellosolve.

[7] A suitable worsted test fabric known as Moth Test cloth may be obtained from Testfabrics, Inc., 55 Van Dam St., New York 13, N.Y.

Conduct the test in a draft-free room with the apparatus at room temperature.

(5) Bring the starting lever over to the extreme right and release it. This starts the timing mechanism and applies the flame to the specimen for a period of .1 second. This should be done within 45 seconds of the time the specimen was removed from the desiccator. Timing is automatic, starting upon application of the flame and ending when the weight is released by the burning of the stop cord.

(6) Record the time of flame spread (reading of stop watch) of each specimen and note whether the base of each specimen having a raised-fiber surface is ignited or fused to a point where the damage is apparent from the bottom of the specimen.

(7) *Results*—(i) *Time of flame spread.* The time of flame spread of the textile is taken as an average time for 5 specimens. Results of tests of specimens before and after dry cleaning and washing shall be recorded and reported separately. If the time of flame spread is less than 4 seconds* or if the specimens do not burn, test 5 additional specimens. The time of flame spread is then taken to be the average time for the 10 specimens or for as many of them as burn.

(ii) *Base fabric ignition or fusing.* Base fabric ignition or fusing of textiles having raised-fiber surfaces shall be reported when the base fabric of more than 1 of the 5 (or 2 of the 10) specimens tested ignites or fuses.†

(8) *Reporting results.* The reported result shall be the flammability before or after dry cleaning and washing, whichever is the lower; and, based on this result, the textile shall be placed in the proper classification as given in § 1610.3.

*In the Flammable Fabrics Act, Congress adopted CS 191-53 as the Commercial Standard to be applied under the law.

On August 23, 1954, the Flammable Fabrics Act was amended, changing the test for the time of flame spread for plain-surfaced fabrics, provided in paragraphs 3.1.1.1 and 3.1.3.1 [codified as §§ 1610.3(a)(1)(i) and 1610.3(a)(3)(i)], by reducing the burning time from 4 to 3½ seconds.

For the purposes of the administration of that act, therefore, the 3½-second burning time for plain-surfaced fabrics is applicable.

†See § 1610.61(c)(3) for a clarification of the criterion for classification of Class 3.

§ 1610.5 Notes.

The methods of test and classifications outlined herein agree with all essential requirements of the Standard Test Method for Flammability of Clothing Textiles, of the American Association of Textile Chemists and Colorists.

Subpart B—Rules and Regulations

AUTHORITY: Sec. 5, 15 U.S.C. 1194, unless otherwise noted.

NOTE: An interpretation, with respect to Ornamental Veils or Veilings, issued by the Federal Trade Commission at 32 FR 11850, Aug. 17, 1967, provides as follows:

Ornamental millinery veils or veilings when used as a part of, in conjunction with, or as a hat, are not to be considered such a "covering for the neck, face, or shoulders" as would, under the first proviso of section 2(d) of the Flammable Fabrics Act, cause the hat to be included within the definition of the term "article of wearing apparel" where such ornamental millinery veils or veilings do not extend more than nine (9) inches from the tip of the crown of the hat to which they are attached and do not extend more than two (2) inches beyond the edge of the brim of the hat.

Where hats are composed entirely of ornamental millinery veils or veilings such hats will not be considered as subject to the Flammable Fabrics Act if the veils or veilings from which they are manufactured were not more than nine (9) inches in width and do not extend more than nine (9) inches from the tip of the crown of the completed hat.

§ 1610.31 Terms defined.

As used in this part, unless the context otherwise specifically requires:

(a) The term "act" means the "Flammable Fabrics Act" (approved June 30, 1953, Pub. Law 88, 83d Congress, 1st sess., 15 U.S.C. 1191; 67 Stat. 111) as amended, 68 Stat. 770, August 23, 1954.

(b) The terms "rule", "rules", "regulations", and "rules and regulations", mean the rules and regulations prescribed by the Commission pursuant to section 5(c) of the act.

(c) The term "United States" means, the several States, the District of Columbia, the Commonwealth of Puerto

LEVEL 1—3 OF 10 CASES

RALPH NADER CONNECTICUT CITIZEN ACTION GROUP v. ALLEGHENY AIRLINES, INC., APPELLANT

No. 78-1251

United States Court of Appeals for the District of Columbia Circuit

Slip Opinion

Argued February 28, 1979
May 16, 1980

Appeal from the United States District Court for the District of Columbia (D.C. Civil Action No. 1346-72)

Frank F. Roberson with whom William A. Bradford, Jr. was on the brief for appellant.

John Cary Sims with whom Alan B. Morrison was on the brief for appellee.

Slip Opinion

David R. Murchison and James E. Landry were on the brief for Amicus Curiae urging reversal.

ROBB

Before MacKINNON, ROBB and WILKEY, Circuit Judges.

Opinion for the Court filed by Circuit Judge ROBB

ROBB, Circuit Judge. This is an appeal by Allegheny Airlines from a judgment of the District Court awarding the plaintiff Ralph Nader compensatory and punitive damages for fraudulent misrepresentation in the sale of an airline ticket.

The facts giving rise to Nader's claim are not disputed. He was scheduled to address a rally in Hartford, Connecticut at noon on April 28, 1972. On April 25, 1972 he reserved a seat on Allegheny flight 864, scheduled to depart from Washington, D.C. for Hartford at 10:15 A.M. on April 28. His reservation was a "confirmed reservation". He arrived at the boarding and check-in area approximately five minutes before the scheduled departure time but was told by Allegheny's agent that he could not be accommodated on flight 864 because all the seats were occupied. He was offered an alternative air taxi flight by way of Philadelphia but he decided not to accept it because of uncertainty as to whether he would arrive in Hartford in time for the noon rally. As a result he was prevented from attending the rally.

The Allegheny agent at the Washington check-in area tendered to Nader the denied boarding form required by CAB regulations (14 C.F.R. § 250.9). This form notifies holders of tickets on flights that are "oversold" that they are entitled to compensation from an airline if they are "bumped", that is, denied transportation. Nader told the agent that he did not need the form because he already had one. In fact, he had received such a form when he was bumped from an American Airlines flight on April 23, 1972, two days before he made his reservation on Allegheny. Six months before that he and five other people had been bumped by Eastern Airlines. On both occasions he held a confirmed reservation.

Pursuant to CAB regulations Allegheny mailed to Nader a check in the amount of $32.41 as denied boarding compensation. Nader's attorney returned the check to Allegheny, together with a letter characterizing the denied

boarding compensation as a "wholly inadequate offer of settlement."

On July 7, 1972 Nader filed suit in the District Court, asserting Allegheny's liability on two theories: (1) a common law action based on fraudulent misrepresentation in that Allegheny failed to inform Nader of its "booking practices" and (2) a statutory action under section 404(b) of the Federal Aviation Act, 49 U.S.C. § 1374(b), arising from Allegheny's alleged failure to afford Nader the boarding priority specified in its rules, filed with the Civil Aeronautics Board pursuant to 14 C.F.R. § 250.3.

The District Court, sitting without a jury, entered a judgment for Nader on both claims, and awarded him a total of $10.00 in compensatory damages and $25,000 in punitive damages. Nader v. Allegheny Airlines, Inc., 365 F. Supp. 128 (D.D.C. 1973). On appeal this court reversed. Nader v. Allegheny Air Lines, Inc., 167 U.S. App. D.C. 350, 512 F.2d 527 (1975). The judgment based on Allegheny's alleged violation of section 404(b) was reversed and the District Court was instructed to make new findings of fact and conclusions of law. The award of punitive damages on the common law claim was reversed. We pointed out that "[since] punitive damages require a finding of malice or reckless disregard for the rights of others, the defendants' motivations are crucial", but "the trial judge never considered whether Allegheny reasonably believed that its policies were completely lawful and in fact carried the approval of the board." Id. at 374, 512 F. 2d at 551. We directed the District Court to award punitive damages "only on the terms set forth in this opinion." Id. at 375, 512 F. 2d at 552. The award of punitive

damages on the statutory claim was reversed on the ground that Allegheny's conduct in applying its boarding priority rule contained no elements of intentional wrongdoing or conscious disregard for Nader's rights. Finally, we held that under the doctrine of primary jurisdiction the CAB must be allowed to determine in the first instance whether failure to disclose the practice of overbooking was deceptive within the meaning of section 411 of the Federal Aviation Act, 49 U.S.C. § 1381. The District Court was instructed to stay further action on this issue pending reference to the CAB.

The Supreme Court of the United States reversed the order of this court granting a stay to give the CAB an opportunity to act. Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976). The Court concluded that the common law action could be heard by the trial court without prior reference to the CAB. Accordingly, we entered an amended judgment and the case was remanded to the District Court.

On remand the District Court found that Allegheny violated section 404(b) of the Act, 49 U.S.C. § 1374(b), by its failure to board Nader in accordance with its own priority boarding rules. For this the court awarded him $10.00 in compensatory damages. The court also found that Allegheny's failure to notify Nader of the chance that he would not be seated constituted fraudulent misrepresentation, and that "defendant Allegheny wantonly implemented its policy of nondisclosure and misrepresentation in conscious, deliberate, and callous disregard of the effect of its policy on its passengers, including plaintiff Nader." The Court awarded Nader $15,000 in punitive damages "to punish defendant Allegheny for its willful and

wanton policy of nondisclosure and misrepresentation and . . . to deter defendant from engaging in such practices in the future." Nader v. Al'egheny Airlines, Inc., 445 F. Supp. 168, 178, 179 (D.D.C. 1978). Compensatory damages on the claim were assessed at $10.00.

On this appeal Allegheny challenges only the award of compensatory and punitive damages on the claim based upon fraudulent misrepresentation.

Nader's reservation was not honored because Allegheny had accepted more reservations for flight 864 than it could accommodate. In other words, the flight had been "overbooked". In its opinion in Nader v. Allegheny Airlines, supra, the Supreme Court discussed the practice of overbooking: [Overbooking] is a common industry practice, designed to ensure that each flight leaves with as few empty seats as possible despite the large number of "No-shows"—reservation-holding passengers who do not appear at flight time. By the use of statistical studies of no-show patterns on specific flights, the airlines attempt to predict the appropriate number of reservations necessary to fill each flight. In this way, they attempt to ensure the most efficient use of aircraft while preserving a flexible booking system that permits passengers to cancel and change reservations without notice or penalty. At times the practice of overbooking results in oversales, which occur when more reservation-holding passengers than can be accommodated actually appear to board the flight. When this occurs, some passengers must be denied boarding ("Bumped"). The chance that any particular passenger will be bumped is so negligible that few prospective passengers aware of the possibility would give it a second thought. In April 1972, the month in which petitioner's

reservation was dishonored, 6.7 confirmed passengers per 10,000 enplanements here denied boarding on domestic flights. For all domestic airlines, oversales resulted in bumping an average of 5.4 passengers per 10,000 enplanements in 1972, and 4.6 per 10,000 enplanements in 1973. In domestic operations respondent oversold 6.3 seats per 10,000 enplanements in 1972 and 4.5 seats per 10,000 enplanements in 1973. Thus, based on the 1972 experience of all domestic airlines, there was only slightly more than one chance in 2,000 that any particular passenger would be bumped on a given flight. [Footnotes omitted]

426 U.S. at 293-94.

The issues presented in this case must be considered in context with the extended consideration which the Civil Aeronautics Board has given to the practice of overbooking.

In 1967, after notice and comment in a rulemaking proceeding, the Board rejected a proposal to include in its rules provisions requiring notice to passengers of an overbooked condition on flights for which they hold tickets. Instead of such a provision the Board promulgated part 250 of its regulations, 14 C.F.R. § 250, which permitted overbooking practices to continue on condition that "carriers file tarifs providing prompt, effective and adequate compensation to the denied boarding passengers". In an explanatory statement the Board made its views on overbooking clear to the airlines and to the public. In short, the Board concluded that the practice was in the public interest. This practice stems from the fact that there

is substantial reservations turnover before flight departure time occasioned by changes in passengers' plans and cancellation of their reservations. In addition, the practice is used to allow for multiple reservations made by some passengers and for "no-shows"—passengers who neglect to cancel reservations they do not intend to use. Reservations turnover can be projected and compensated for by booking in excess of the capacity of the aircraft to a predetermined extent. By carefully controlling overbooking in this manner on certain flights, carriers can reduce the chance of aircraft departing with empty seats. At the same time, through the carriers' acceptance of reservations in excess of inventory, passengers are able to secure space on flights which can in fact accommodate them and are also benefited by being offered maximum flexibility in securing, cancelling and changing reservations without charge or penalty. However, where carriers overestimate reservations turnover on a particular flight, overbooking can result in oversales and passengers holding confirmed reserved space are denied boarding.

[Were] the carrier prevented from overbooking, large numbers of passengers would be denied reservations on flights which, because of reservations turnover and "No-shows", would depart with empty seats.

In our view, any realistic appraisal of the practice of overbooking leads to the conclusion that, while it results in oversales, it also contributes to flexibility and freedom in securing, changing, and cancelling reservations. Thus, any rigid controls over overbooking, as now practiced, would inevitably lead to restrictions on privileges which contribute greatly to the convenience of air transportation, and have come to be relied upon by the traveling public.

In addition such controls would reduce load factors, and the additional cost would ultimately have to be borne by the traveling public.

In light of the above, it can be seen that the present reservations systems of the carriers in general benefit the traveling public. 32 Fed. Reg. 460, 461.

This case presents two questions: (1) was Allegheny liable to Nader in tort for fraudulent misrepresentations? and (2) assuming such liability was the award of punitive damages proper? We first address the second question and conclude that assuming liability the award of punitive damages was clearly erroneous.

The Civil Aeronautics Board in 1967 had publicly and formally expressed its approval of the practice of overbooking and had declined to issue a rule requiring notice to holders of tickets for an overbooked flight. As we observed in the first Nader case, 167 U.S. App. D.C. at 358, 512 F.2d at 535, the Board's determination to permit the carriers to continue the practice of nondisclosure was based on the recognition that disclosure "would create anxiety and confusion in the public, would cause the public to make a great number of duplicative and protective reservations, wou'd produce a rap'd turnover in reservations within the twenty-four hours before the departure of a flight and would increase the no-show problem. The Board concluded that "any rigid controls over overbooking, as now practiced, would inevitably lead to restrictions on privileges which contribute greatly to the convenience of air transportation, and have come to be relied upon by the traveling public. In addition, such controls would reduce load factors and the additional cost would ultimately have to be borne by the traveling public." 32

Fed. Reg. at 461 (1967). In summary the Board stated that the reservation systems of the carriers "in general benefit the traveling public." Id. The Board had not modified or retreated from this position when Nader made his reservation in 1972. Allegheny's policies and practices as applied to Nader therefore carried the approval of the Board; and Allegheny must have believed that they were approved. Under these circumstances it was clearly erroneous to find as did the District Court that Allegheny's "policy of nondisclosure" was "willful and wanton" and showed a "conscious, deliberate and callous disregard" for its passengers. An airline may not be condemned as a wanton wrongdoer for conforming to the standards set and the practices approved by the agency charged with the duty of regulating it—standards and practices that the agency has found to be in the public interest. The award of punitive damages must be set aside.

A representation may be false and fraudulent in a technical sense, although it is not so gross and wanton that it justifies an award of punitive damages. We therefore turn to the question whether Allegheny was guilty of fraudulent misrepresentation in failing to disclose to Nader that his "confirmed reservation" was subject to the contingency that he might be denied boarding if his flight was overbooked.

The elements of the tort of fraudulent misrepresentation are (1) a false representation, (2) in reference to a material fact, (3) made with knowledge of its falsity, (4) and with intent to deceive, (5) with action taken in reliance upon the representation. Nader v. Allegheny Airlines, Inc., 167 U.S. App. D.C. at 364 n. 32, 512 F. 2d at 541 n. 32 (1976).

In the first Nader case we reversed as clearly erroneous the District Court's finding that Allegheny affirmatively represented to Nader that he had a reservation guaranteeing him a seat. Id. at 365, 512 F. 2d at 542. We he'd that Allegheny's fault, if any, was its failure to disclose that its policy of deliberate overbooking qualified the meaning of a "confirmed reservation". The District Court found that Allegheny had a duty of disclosure to Nader, that its failure to disclose amounted to a false representation, and that by a preponderance of the evidence Nader had proved the other elements of the tort of fraudu'ent misrepresentation.

The record discloses that in the seventeen months preceding the Nader incident Allegheny had experienced only two oversales on flight 864, and statistical analyses had shown that in 1972 there was only slightly more than one chance in two thousand that a ticket holder would be denied boarding because of an oversale. Stated another way the chance that a ho'der of a confirmed reservation would be boarded was approximately 99.95 out of 100. Allegheny argues that because the chance that Nader would be denied boarding was thus "so negligible as to be practically insignificant" the possibility that bumping might occur was not a material fact and the airline cannot be charged with misrepresentation in failing to disclose it. The theory of the airline is that a confirmed reservation is not a guarantee but is only a "reasonable assurance" of being flown, because any flight may be cancelled as the result of weather conditions, mechanical problems, or the like. The airline says that Nader had that reasonable assurance of being flown; the chance of being bumped because of overbooking was too remote to affect the assur-

ance, and silence about such a chance therefore did not amount to a false representation in reference to a material fact. As the District Court found, however, confirmation of a reservation connotes a guarantee of flight subject only to contingencies beyond the control of the airline. The possibility of being bumped because of overbooking is a factor within the airlines' control. That the possibility may be slight does not make it immaterial, it is still a factor in the equation, and as Nader's experience demonstrates it may be an important factor. No one who has suffered the disruption of travel plans by denial of boarding would believe otherwise.

Six years after the Nader incident the Civil Aeronautics Board confirmed our opinion that the practice of overbooking is a material fact which should be brought to the attention of those purchasing tickets. This the Board did by promulgating 14 C.F.R. § 250.11, 43 Fed. Reg. 24, 284 (1978). This regulation requires carriers to post in their ticket offices and include with each ticket sold a notice that "Airline flights may be overbooked, and there is a slight chance that a seat will not be available on a flight for which a person has a confirmed reservation."

Nader could not recover on his tort claim unless the evidence established that Allegheny intended to deceive him when it failed to notify him of its overbooking practice. The District Court found in summary fashion that Allegheny had such an intent to deceive. The Court's entire discussion of this issue was:

There can be no doubt that the nondisclosure of the existence of defendant's overbooking practice was the result of a conscious and deliberate po'icy implemented by

Allegheny in order to deprive passengers of information about its overbooking practice so as not to distinguish Allegheny's reservation practices from those of its competitors.

445 F. Supp. at 175. We think this finding is unsupported by the evidence and clearly erroneous.

As we have seen the matter of overbooking had been thoroughly explored by the Civil Aeronautics Board in public hearings. In public comments filed in those proceedings Allegheny had acknowledged its practice of overbooking and explained its benefits. The record discloses that the Board's Office of Consumer Affairs had issued and distributed 400,000 copies of a booklet on consumers' rights in air travel which covered the subject of denied boarding. Overbooking had been discussed in periodicals of general circulation.[1] The Board had promulgated rules published in the Code of Federal Regulations and specifically designed to address situations caused by the practice of overbooking. 14 C.F.R. § 250 (1972). In short, the practice of overbooking in the air transportation industry was public information, openly discussed by the carriers, the Board and publications of national circulation. In the light of these facts we cannot accept

[1]See Ruppenthal, K.M. "Bumping the Passenger," NATION, June 25, 1960, at 551-53; "He who got bumped," TIME, February 2, 1962, at 50; "Bumpy Departures on the airlines. Failure to Honor Reservations," CONSUMER REPORT, November, 1967, at 565-66; "Board Proposes Hike in Airline Overbooking Penalties," AVIATION WEEK AND SPACE TECHNOLOGY, January 23, 1967, at 39; "CAB Tightens Enforcement on Oversales, "AVIATION WEEK, June 29, 1970, at 28; "What Are Your Rights When You Buy a Plane Ticket," BETTER HOMES AND GARDENS, January 1972, at 10, "CAB Finds Denied Boarding Cut in 1972," AVIATION WEEK, February 14, 1972, at 32.

the District Court's conclusion that Allegheny's failure to notify Nader of its overbooking practice was motivated by deceit and the desire to deprive him of information. The practice of overbooking was no secret, no covert operation, but was openly carried on, and Allegheny was entitled to believe that any knowledgeable passenger knew of the practice. The court's finding that Allegheny harbored an intent to deceive is, we think, contrary to the evidence. An airline which intends to deceive by concealing facts does not advertise the facts in public proceedings.

Moreover, in order to recover for the tort of fraudulent misrepresentation, the false representation must have played a material and substantial part in leading the plaintiff to adopt his particular course, and when . . . it is clear that he was not in any way influenced by it, . . . his loss is not attributed to the defendant.

In order to be influenced by the representation, the plaintiff must of course have relief upon it, and believed it to be true. If it appears that he knew the facts, or believed the statement to be false, or that he was in fact so skeptical as to its truth that he reposed no confidence in it, it cannot be regarded as a substantial cause of his conduct. [footnotes omitted] W. PROSSER, LAW OF TORTS § 108 at 714 (4th Ed. 1971). The plaintiff Nader was an extraordinarily knowledgeable passenger, an able laywer and a famous and distinguished advocate of consumer rights, including the rights of airline passengers. On April 23, 1972, only two days before he made his reservation on Allegheny flight 864, Nader was bumped from an American Airlines flight. Six months earlier he had been bumped by Eastern Airlines. On both occasions he held a con-

firmed reservation. In addition, upon being told that he could not be accommodated on flight 864 because all the seats were occupied, and being tendered the denied boarding form required by CAB regulations, Nader informed the Allegheny ticket agent that he was familiar with the form. On deposition Nader explained that he told the agent he did not need the form because "I already knew what it said". In fact he had received such a form when he was bumped from the American Airlines flight. The form stated: Tariffs filed by this carrier with the Civil Aeronautics Board provide denied boarding compensation to a passenger holding confirmed reserved space where the flight for which the passenger holds such space is unable to accommodate him and departs without him. [See 14 C.F.R. § 250.9 (1972)] Therefore, the evidence demonstrates that Nader "knew the facts" that a confirmed reservation did not exclude the possibility that he might not be boarded. "[One] who has special knowledge, experience and competence may not be permitted to rely on statements for which the ordinary man might recover." See W. PROSSER, supra at 717. It cannot be said that Nader relied on his confirmed reservation with Allegheny as a guarantee of passage.

The judgment for both compensatory and punitive damage is reversed.

Fourteenth Amendment to the United States Constitution, Sec. I:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Commerce Clause of the United States Constitution, Art. I, Sec. 8, Cl. 3:

"The Congress shall have Power . . . To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

Supremacy Clause of the United States Constitution, Art. VI, Cl. 2:

"2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

STATE OF MINNESOTA — DISTRICT COURT
County of Ramsey — Second Judicial District

LEE ANN GRYC, by her mother and natural guardian, JACQUELYN GRYC, and JACQUELYN GRYC, individually,

Plaintiffs,

vs.

DAYTON-HUDSON CORP., a Minnesota corporation; STYLE UNDIES, INC.; RIEGEL TEXTILE CORP.; and ASSOCIATED MERCHANDISING CORP.,

Defendants.

NOTICE OF MOTION

407340

TO THE PLAINTIFFS AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE that upon all the files, exhibits, minutes of the Court, depositions read during trial and a transcript of the reporter's notes, defendant Riegel will move the Court, the Honorable Hyam Segell presiding in chambers, 14th floor, Room 1409, Ramsey County Court House, St. Paul, MN on the 27th day of June 1978 at 9:30 o'clock A.M., or at such other time as may be set by order of this Court, for an Order setting aside the Findings of Fact of the Jury and the Conclusions of Law and Order for Judgment of the Court pursuant thereto, and granting judgment to defendant Riegel notwithstanding the verdict. In the alternative, defendant Riegel will

move the Court for amended Findings of Fact, Conclusions of Law and Order for Judgment, or for a new trial on all issues.

* * *

MOTION FOR JNOV RE PUNITIVE DAMAGES

Defendant Riegel moves the Court for Judgment Notwithstanding the Verdict for punitive damages of $1,000,000 on the following grounds:

* * *

14. Error of the Court in submitting the issue of punitive damages to the jury.

* * *

MOTION FOR JNOV RE COMPENSATORY DAMAGES

Defendant Riegel moves the Court for Judgment Notwithstanding the Verdict for compensatory damages of $751,000 on the following grounds:

1. On all grounds stated above, as if repeated here.

* * *

4. Errors of Court in refusing Riegel's written requests for jury instructions.

* * *

MOTION FOR A NEW TRIAL:

In the alternative, Riegel moves the Court for a new trial on all issues on the following grounds:

1. On all grounds stated above, as if repeated here.

* * *

7. Error of the Court in instructing the jury that the Flammable Fabrics Act and the test CS 191-53 is not a standard by which the conduct of defendant Riegel is to be measured.

Dated:

June 19, 1978

PETERSON, HOLTZE & TREAT, P.A.
/s/ R. C. HOLTZE
Attorneys for Defendant Riegel
1238 Baker Bldg.
Minneapolis, MN 55402
333-4381

STATE OF MINNESOTA
County of Ramsey

DISTRICT COURT
Second Judicial District

GRYC, et al.,

vs.

RIEGEL TEXTILE CORP. et al.,

DEFENDANT RIEGEL'S MEMORANDUM ON THE COURT'S CHARGE

407340

Defendant Riegel's post-trial motions are based in part upon its claim that the jury reached its verdict in reliance upon mis-statements of the applicable law. Other than the Court's instructions on punitive damages, which

are treated in a separate memorandum, the errors in the instructions can be grouped into three general categories: 1) Failure to give instructions requested by Riegel, 2) Mis-statements of the applicable law, and 3) Undue and prejudicial emphasis on Defendant Riegel, its product, and the theory advanced against it.

* * *

b.

Defendant suggests that the Court's charge on the Flammable Fabrics Act of 1953 and the test incorporated therein, CS 191-53, were serious mis-statements of the applicable law. In its trial brief on the subject, Defendant Riegel provided the Court with authority for the instructions requested by Defendant Riegel on the point. Defendant Riegel submits that the law is that evidence that a particular cloth passed the test is evidence that it is normally flammable and that it is not unreasonably dangerous. *Bellotte v. Zayre Corp.*, 531 F.2d 1100 (1976); *Simien v. S. S. Kresge Co.*, 556 F.2d 551 (1978). By instructing the jury that CS 191-53 is only a part of a criminal statute and therefore not the test by which Riegel's conduct is to be measured, and by letting plaintiffs devote a substantial portion of their case to attacking this Federal Statute, the Court deprived Defendant Riegel of a defense to which it was entitled by law. Moreover, the Court's statement that the Flammable Fabrics Act of 1953 is only a criminal statute is inaccurate. That Act provides that violation of its provisions subject the violator not only to criminal penalties but also to the FTC Act and sanctions available under it, including injunctive relief and seizure of the goods. If the Court were trying an automobile

accident case and a defendant who was exceeding the speed limit requested a similar instruction directing the jury to disregard the speed statute, the Court would not even give that request serious consideration.

The evidence shows that the cloth in the Gryc pajamas did not ignite after a one second exposure to flame, as required by the CS 191-53 test. Forced ignition using that test required two seconds and the cloth strip burned far enough to release the trip cord in approximately 10 seconds, as compared with a 4 second standard in the CS 191-53 test. Consequently, the cloth is more than twice as safe as the minimum required to pass this test. As stated by the *Simien* Court, 566 F.2d at 557:

> This testimony that the fabric far exceeded the minimum Federal requirements is evidence, indeed substantial evidence, that the jacket was not unreasonably dangerous. (Citing *Bellotte.*)

The Court's charge deprived Defendant Riegel of this substantial evidence. It should also be noted that the *Simien* Court reversed the trial court for incorrectly instructing on this very point.

* * *

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STATE OF MINNESOTA
County of Ramsey

DISTRICT COURT
Second Judicial District

LEE ANN GRYC, by her mother and natural guardian, JACQUELYN GRYC, and JACQUELYN GRYC, individually,

Plaintiffs,

vs.

DAYTON-HUDSON CORP., a Minnesota corporation; STYLE UNDIES, INC.; RIEGEL TEXTILE CORP.; and ASSOCIATED MERCHANDISING CORP.,

Defendants.

MEMORANDUM OF RIEGEL ON PUNITIVE DAMAGES

* * *

FLAMMABLE FABRICS ACT OF 1953

The testimony unequivocally showed, and plaintiffs had no evidence to the contrary, that the flannelette in the pajamas, when tested, passed the Flammable Fabrics Act of 1953 and the Commercial Standards Test 191-53, promulgated in accordance with that Act. It is the position of the defendant Riegel that the Court should have instructed the jury in substance that compliance with that Act and the Commercial Standard 191-53, could be considered by the jury as evidence that, among other things, the cloth was not defective. Certainly, successful compliance with that Federal regulation should have been considered by the jury when they are considering the assessment of punitive damages against the defendant Riegel.

Instead, the Court charged the jury as follows:

> "Now repeated reference has been made in this case to a test called CS 191-53 which is a part of the Flammable Fabrics Act of 1953 as amended, and it is contended by the defendant Riegel Textile Corporation that the cotton flannelette manufactured by it was in compliance with that test; however, since the Flammable Fabrics Act is a criminal statute, compliance with that test is not the standard by which the conduct of the defendant Riegel Textile Corporation is to be measured."

This is basically an error of law, both on the question of compensatory damages and punitive damages.

Attention is directed to *Simeon v. S. S. Kresge Co.*, 566 F.2d 551, USCCA 5th Cir. 1/20/78. In that action the Court approved an instruction to the jury that would have advised the jury that in passing upon whether the design or the material of a jacket was defective, they were permitted to take into consideration accepted standards in the jacket industry and may take into consideration that the jacket was manufactured in compliance with the Federal Flammable Fabrics Act or Commercial Standard 191-53.

The Circuit Court granted a new trial to the defendant Kresge because in the Court's charge the Court inadvertently said that compliance would be evidence that the jacket was defective rather than that the jacket was not defective.

We quote as follows from the case of *Simeon v. S. S. Kresge, supra:*

"Compliance with these federal statutory safety requirements and industry standards is evidence that a product is not defective. *United States v. Estremera,* 531 F.2d 1103 (2nd Cir. 1976) (that a fabric is 'normally flammable' under the Flammable Fabrics Act is evidence that the fabric is not unreasonably dangerous); cf. *Muncie Aviation Corp. v. Party Doll Fleet, Inc.,* 519 F.2d 1178 (5th Cir. 1975) (Federal Aviation Administration advisory circulars are admissible as bearing on the standard of care in determining negligence)."

* * *

We respectfully submit, on the basis of the foregoing authority, that this Court grant judgment notwithstanding the verdict in favor of the defendant Riegel on the issue of punitive damages. Such a verdict is not justified by the evidence or authorized by the laws of the State of Minnesota.

Respectfully submitted,

JARDINE, LOGAN & O'BRIEN
By DONALD M. JARDINE

STATE OF MINNESOTA
County of Ramsey

DISTRICT COURT
Second Judicial District

LEE ANN GRYC, by her mother and natural guardian, JACQUELYN GRYC, and JACQUELYN GRYC, individually,

Plaintiffs,

vs.

DAYTON-HUDSON CORP., a Minnesota corporation; STYLE UNDIES, INC.; RIEGEL TEXTILE CORP.; and ASSOCIATED MERCHANDISING CORP.,

Defendants.

SUPPLEMENTAL MEMORANDUM OF RIEGEL ON PUNITIVE DAMAGES

Defendant Riegel requests the opportunity to supplement its memorandum on punitive damages previously submitted on the pending post-trial motions. The memorandum is addressed to the narrow issue of whether there is sufficient evidence that Riegel acted in reckless disregard of the rights of the consuming public in the light of the action taken by Congress in 1953 establishing CS 191-53 as the test dividing unreasonably dangerous clothing fabrics from those of normal flammability which were permissible for manufacture and sale.

* * *

A second reason why punitive damages should not be allowed in this situation is that to do so will permit any six persons, chosen at random in any State of the Union

to override the regulatory judgment of Congress that a standard product—such as cotton fabric—is safe enough to be permitted to be sold in interstate commerce. The principal functions of huge punitive damage verdicts, such as here, are punishment and deterrence. It seems highly anomalous that a manufacturer can be punished for selling a product which Congress expressly authorized him to sell. Similarly it runs counter to the basic theory of democratic government to authorize a random group of six persons to determine that a popular and widely used product should be banned from sale even though the elected representatives of all the people had determined that it need not be. Yet where, as here, the commodity cannot be made sufficiently safe to avoid totally the known hazard, the intended effect of punitive damage awards is to force the product off the market.

Logic and federal-state comity both dictate that punitive damages should not be allowed in this type of case.

* * *

Not only is a businessman—or any other citizen—not liable for damages for obtaining favorable legislation which may injure others, but he has the same right to act on the basis of that legislation as he does to rely on any other legislative enactment. Thus Riegel must, as a matter of law, be held to have acted in good faith in 1967 when it sold the fabric involved in the Gryc accident in complete compliance with the Flammable Fabrics Act. Having acted in good faith, it cannot be held in punitive damages for that sale.

Respectfully submitted.

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No. 80-279

IN THE

Supreme Court of the United States

October Term, 1980

RIEGEL TEXTILE CORPORATION,

Petitioner,

vs.

LEE ANN GRYC, by her mother and natural guardian, JACQUELYN GRYC, and JACQUELYN GRYC, individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF OF RESPONDENTS IN OPPOSITION

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IN THE

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF OF RESPONDENTS IN OPPOSITION

ARGUMENT

INTRODUCTION

Four year old LeeAnn Gryc was severely injured on December 8, 1969 when her pajama top instantaneously burst into flame when it came in contact with an electric burner on the kitchen stove and LeeAnn was immediately engulfed in flames. The fabric in her pajamas, cotton flannelette, manufactured by petitioner Riegel, passed the minimal flammability standard set by the Flammable Fabrics Act of 1953, CS191-53. Although this fabric passed the CS191-53 standard, the evidence showed that almost everything passed CS191-53. It was shown at trial that not only did newspaper pass the CS191-53 test,[1] but that the test declared newspaper 48 percent safer than was minimally necessary for flammability protection for use in a known hazard, children's sleepwear.[2] Testing also showed that there was no significant flammability difference between LeeAnn's pajamas and those fashioned out of newspaper.

It is generally recognized by courts and commentators that the source of the CS191-53 standard is the textile industry itself. In 1960, petitioner Riegel's vice president noted that a textile organization had "guided the government" towards the flammability standard which was "not only practical for the textile industry but which gave the maximum necessary protection to the American public."[3] Expert testimony showed

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[1] Other courts have also noted that newspaper passes CS191-53. *Howard v. McCrory*, 601 F.2d 133 (1979).

[2] Sleepwear generally is more loose fitting and billowy than other clothing and thus is more likely to come into contact with a common household source of ignition. Riegel's personnel testified that children, because of their innocence and inexperience, were more likely to be ignited than adults.

[3] Trial Exhibit AC. See also Note: *Flammable Fabrics Act Protection: Fire Resistants v. Industry Resistance*, 39 Geo. Wash. L. Rev. 608 (1971).

that fabric in LeeAnn's pajama burst into flames instantaneously on contact with a similar burner. Compensatory damages were awarded against petitioner Riegel for the following reasons:

1. The defective and unreasonably dangerous flammability characteristics of the fabric.
2. Chemical flame retardants were available to Riegel for many years and were not applied to this fabric.
3. The fabric could have been made out of inherently flame retardant synthetic fibers, but was not.
4. Warnings concerning this cotton flannelette's flammability could have been passed through the stream of commerce, but were not.
5. Instructions concerning a simple home method of temporarily flame retarding the fabric could have been given, but were not.

Punitive damages were awarded because of petitioner's complete knowledge that there were many children who were being severely injured or killed during those times by unreasonably dangerous cotton flannelette sleepwear. Riegel also knew that paper passed the CS191-53 test.[4] Despite petitioner's knowledge it intransigently refused to do anything to reduce the hazard either by way of product improvement, or warnings, or instructions. In 1956, in a memorandum entitled "Flammability-Liability", Riegel's vice president referred to the "powder keg" that Riegel was sitting on because of the flammability of its flannelette.[5] Despite this powder keg, the evidence showed that Riegel's research department spent only minimal amounts in studying various alternatives which would have reduced the extreme flammability hazard, as

[4] Trial Exhibit AN.
[5] Trial Exhibit AO.

petitioner kept these alternatives under "surveillance" until safer fabrics were mandated by law.[6] The Minnesota Supreme Court found "sufficient, in fact substantial, evidence for the jury to find that Riegel acted in a willful, wanton and/or malicious disregard of the rights of others in marketing its flannelette."[7]

1. THE AWARD IN THIS MATTER DOES NOT RAISE ANY SUBSTANTIAL OR IMPORTANT FEDERAL ISSUES.

Citing no authority, petitioner asserts that Congress preempted the ability of the judiciary to make common law tort awards of both compensatory and punitive damages to victims of clothing fires, which fires were caused by explosive fabric such as cotton flannelette.

As to the award of compensatory damages, petitioner makes no further argument, despite the fact that their position flies directly in the face of all case law. Every court that has considered the issue has held that the Flammable Fabrics Act sets a minimal safety standard and, in the proper case, courts and juries should be allowed to make awards of compensatory damages to an injured clothing fire victim, even though the fabric involved passed the CS191-53 test. *Raymond v. Riegel Textile Corp.*, 484 F.2d 1025 (1st Cir., 1973); *Lagorga v. Kruger Co.*, 275 F.Supp. 373 (W.D.Pa., 1967), aff'd 407 F.2d 671 (3rd Cir., 1969); *Sherman v. M. Lowenstein & Sons, Inc.*, 28 App.Div.2d 922, 282 N.Y.Supp.2d 142 (1967); *Bellotte v. Zayre Corp.*, 531 F.2d 1100 (1st Cir., 1976). Even *Simien v. S.S. Kresge Co.*, 556 F.2d 551 (5th Cir., 1978), which involves an adult male throwing gasoline on a fire and the ignition of a nylon fabric which subsequent

[6] Trial Exhibit DA.
[7] A-28.

experimentation showed was almost impossible to ignite, does not alter this rule of law.

The commentators agree that the existence of a minimal federal flammability standard does not prohibit a jury from making any common law tort award. See *Elkind "The War Against Flammable Fabrics—Punitive Damages: Consumer's Atomic Age Weapon"* 3 Trial 42 (April-May, 1967); *"Dressed to Kill: The Flammable Fabrics Act of 1953—Twenty Years in Retrospect"* 4 Cumberland-Sandford L. Rev. 358 (1976); Note: *"Flammable Fabrics Act Protection: Fire Resistants v. Industry Resistance,"* 39 Geo. Wash. L. Rev. 608 (1971); Note: *"The Human Torch—An Exegis About the Clothes We Wear,"* 23 S.C. L. Rev. 787 (1971); Swartz, *"Product Liability: The Torch Cases,"* 76 Case and Comment 3 (January-February, 1971).

The only thing unique about this case is that it involves an award of punitive damages against a textile manufacturer. The law of punitive damages in product liability litigation is evolving as society recognizes the need for these types of damages to balance the interest of responsible manufacturers, irresponsible manufacturers, and consumers. The need for the ability to impose punitive damage award against certain manufacturers is being recognized by juries, courts,[8] legislatures,[9] commentators[10] and the United States Department of Commerce.[11]

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[8] *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir., 1975), Cert. Den. 424 U.S. 913 (1976); *Sturm, Rugger & Co. v. Day*, 594 P.2d 38 (Alaska, 1979); *Rinker v. Ford Motor Co.*, 567 S.W.2d 655 (Mo. Ct. App., 1978); *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).

[9] Minn. Stat. 549.20.

[10] Owen, Punitive Damages in Product Liability Litigation, 74 Mich. L. Rev. 1253 (1976).

[11] Uniform Product Liability Act, §120, 44 Fed. Reg. 62748 (1979).

No court, commentator or legislative body has ever seriously thought that a punitive damage award in a product liability setting creates an undue burden on Interstate Commerce. Further, the imposition of common law civil penalties is not violative of the due process clause. *Toole v. Richardson-Merrell, Inc.*, 251 Cal.App.2d 689, 60 Cal. Rptr. 398 (1967); *U.S. v. Regan*, 232 U.S. 37 (1914). It is a common law obligation not to be wantonly indifferent to serious injuries or the means to reduce those injuries.

The Department of Commerce, in drafting the Uniform Product Liability Act, at Section 108,[12] recognized that a claimant may prevail in product liability litigation where existing legislative or administrative standards do not meet an appropriate level of safety. Further, at Section 120[13] it was recognized that punitive damages may be imposed when the harm suffered was the result of a product seller's reckless disregard for the safety of those who may be harmed by the product. There is no provision in the punitive damage section for any exemption from common law liability for punitive damages because of the mere existence of a minimal federal safety standard. It is well-settled law that the existence of a federal "safety" standard does not insulate a manufacturer from common law tort liability. The law is best summarized in Rheingold, *"The Expanding Liability of the Product Supplier: A Primer,"* 2 Hofstra L.Rev. 521, 557 (1974):

> "It would be improper to allow compliance with any law or the fact of explicit government approval, to cause the issue of whether defendant was negligent or otherwise liable to be removed from the consideration of the

[12] 44 Fed. Reg. 62730 (1979).
[13] 44 Fed. Reg. 62748 (1979).

jury. To do so is to confuse the jury's role with the purpose of governmental oversight. The latter sets a minimum acceptable standard, whereas the former is whatever the common law says it is. Such standards as those set under the Flammable Fabrics Act have shown that the community (jurors) standard can and should be set much higher than whatever it is that the industry is able to work out in a behind-the-doors setting with bureaucracy.[14] There is also a question as to whether defendant is offering anything more than self-serving proof when he offers to show that he complied with private standards which he himself helped to promulgate."

The punitive damage award in this case does not create a state regulation of what fabrics may be produced or sold in the State of Minnesota. Rather it reflects necessary punishment and hopeful deterrence of a manufacturer's indifference to the injuries its products were causing. Riegel grossly breached its common law duty to a little girl by using CS191-53 as an excuse for not making product improvements or giving warnings or instructions, all in the face of what it knew was a great public health hazard. No substantial federal question exists in this case.

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[14] Citing *Raymond v. Riegel*, 484 F.2d 1025 (1st Cir., 1973) (Flammable Fabrics Act); *Griffith v. Planters Chemical Corp.*, 302 F.Supp. 937 (P.S.C., 1969) (F. Pesticide Reg.); *Nowland v. Shoe Corp. of America*, 47 FRD. 6 (D. of Del., 1969) (ASA Standard for Ladders); *Bexiga v. Havir Mfg. Corp.*, 60 N.J. 42, 290 A2d 281 (1972) (Industrial Standards); *Sherman v. M. Lowenstein & Sons, Inc.*, 28 App. Div. 2d 922, 282 N.Y.Supp. 2d 142 (1967) (Flammable Fabrics Act); *Incollingo v. Ewing*, 44 Pa. 263, 282 A2d 206 (1971).

2. THE FLAMMABLE FABRICS ACT DOES NOT PREEMPT THE MINNESOTA COURT'S ABILITY TO PROTECT THE SAFETY OF ITS CITIZENS.

The Minnesota Court, in its decision, thoroughly and completely examined the question of whether the preemption provision of the Flammable Fabrics Act and Supremacy Clause of the United States Constitution prohibited the imposition of punitive damages on a defendant who has complied with the Act. It concluded that those provisions did not prohibit the imposition of punitive damages. The Minnesota Court's analysis of this issue is logical, sound and complete and needs no further supplementation from this Court. For this reason it is unnecessary for this Court to expand upon the Minnesota decision.

The Minnesota Court noted that the 1967 preemption provision preempted all inconsistent state laws without explaining which type of state actions were preempted. The Minnesota Court then noted that the 1976 amendment clarified this ambiguity by replacing the term "law" with the term flammability "standard or regulation". Thus, it was clear that Congress only intended to preclude inconsistent state statutory law which sought to establish specific regulations. Congress therefore did not expressly preempt common law remedies.

The Minnesota Court further found that Congress did not implicitly preempt any common law remedies. In addition, the Minnesota Court looked to the Consumer Products Safety Act, 15 U.S.C. 2051 et seq. to determine congressional intent. This Act presently is applicable to flammable fabrics. Section 2074A of the Act, entitled "Private Remedies", states as follows:

> Compliance with consumer products safety rules or other rules or orders under this chapter shall not relieve any person from liability at common law or state statutory law to any other person.

There are sound policy reasons why the Consumer Products Safety Act allows an injured consumer to make claim for compensatory damages, and, in an appropriate case, for punitive damages. There are literally millions of products being manufactured and consumed in the United States each year. Government cannot take the full responsibility to determine which of these products may be hazardous and which are not. Government cannot take the responsibility to determine which manufacturers are acting responsibly and which are acting in wanton indifference to product safety.[15] That duty traditionally and appropriately is a function of the common law.

Finally, the Minnesota Court recognized that this Court has held on numerous occasions that states have a vital interest in protecting their citizens from injury, and accordingly, only a clear expression of congressional intent deprives the state of its inherent power to make awards of compensatory and punitive damages. *U.A.W. v. Russell*, 356 U.S. 634 (1958); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966).

The State of Minnesota has a vital interest in seeing that injured victims, such as LeeAnn Gryc, are compensated. It also has a vital interest in protecting all of its citizens by encouraging manufacturers, such as petitioner Riegel, to ac-

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[15] It has been noted that the Consumer Product Safety Commission has only 125 inspectors for all the products in the United States. It is intended that private attorneys seek out a manufacturers common law liability for its products. Product reliability comes from product liability. Philo, "*Lawyers Desk Reference* §8:13" (Vol. 1, P. 546 (1979)).

cept the responsibility which flows from the power of its position, and in discouraging the marketing of products which it knows to be highly dangerous. This encouragement takes the form of punitive damages.

There is no inconsistency between the Federal purposes behind the setting of a minimum flammable fabric standard in 1953 and the state court purposes in acting to protect the safety of its citizens through a jury award in 1978.

3. THE JURY WAS INSTRUCTED THAT IT SHOULD CONSIDER THE RESULTS OF THE CS191-53 TEST TOGETHER WITH ALL THE EVIDENCE IN DETERMINING WHETHER THE FABRIC PRODUCED BY PETITIONER RIEGEL WAS DEFECTIVE AND UNREASONABLY DANGEROUS.

The instruction concerning the effect to be given the CS191-53 standard was complete and proper. The jury was aware that LeeAnn's pajama top ignited instantaneously upon contact with a common household source of ignition, and that CS191-53 declared newspaper to be 48 percent safer than was really necessary for fabric in children's sleepwear. The instruction was proper and the evidence overwhelming that CS191-53 was of no assistance in determining the relative flammability hazard presented in children's sleepwear.

The Minnesota Court did not declare CS191-53 invalid in the legal sense of declaring the Federal act and regulations to have no further legal effect in the State of Minnesota. Rather, CS191-53 was declared invalid in a factual sense in that it was found by the jury that the test in no way accurately predicted the relative flammability hazard of cotton flannelette pajamas for a four year old girl. Obviously, CS191-53 declared newspaper to be substantially safer than was necessary for a known hazard, children's sleepwear.

4. CONCLUSION.

Of all the reported cases, the evidence in this case established most completely the rationale behind the growing body of law imposing punitive damages against some manufacturers for their misconduct. Petitioner Riegel interprets the Flammable Fabrics Act in a way that would give it license to commit the most heinous manufacturing misconduct, to willfully manufacture a hazardous product knowing and ignoring the means to reduce the hazard. The Minnesota Court completely and logically analyzed why that license should not be granted. There is no reason why this Court should find any substantial federal question involved in the State Court's imposition of common law remedies.

Respectfully submitted,

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